Sunshine Piping, Inc. *and* United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local Number 366. Case 15–CA–16781

December 31, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On June 30, 2003, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief, a motion to strike portions of the General Counsel's brief, and cross-exceptions with supporting argument. The General Counsel opposed the Respondent's motion to strike portions of the General Counsel's exceptions brief. Subsequently, as will be explained more fully below, the General Counsel filed a motion to reopen the record. This motion was granted. On December 23, 2004, Judge Brakebusch issued the attached supplemental decision upon the reopened record. The Respondent filed exceptions and a supporting brief,[1] along with a request for oral argument.[2] The General Counsel filed cross-exceptions and a supporting brief.[3] The General Counsel and the Respondent each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and supplemental decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this decision, and to adopt the judge's recommended Order as modified.[5] Specifically, we adopt the judge's findings and conclusions as to the substantive allegations of the complaint, as amended at hearing, but we reverse her award of litigation costs to the General Counsel.

I. BACKGROUND AND PROCEDURAL HISTORY

The Respondent, Sunshine Piping, Incorporated, builds pipe used in cooling systems for turbines and electric generating plants. James Scott is the Respondent's majority owner and is responsible for its day-to-day operations. His son, Kevin Scott, served as the Respondent's vice president.[6] The Respondent hired employee Robert Huggins as a welder on January 16, 2002.[7] Huggins, along with a number of other employees, was laid off on March 21 and recalled on June 3. These layoffs were alleged as unlawful in an earlier case. See *Sunshine Piping, Inc.*, 350 NLRB No. 90 (2007) (*Sunshine I*).[8] Huggins testified at the hearing in that case on August 26. After testifying, Huggins received three written warnings and a verbal warning, on August 26, 28, 30, and September 18, respectively, allegedly for poor work performance. The Respondent also gave Huggins a written warning on September 13 and a suspension on September 4, and it ultimately terminated him on September 30, all for allegedly violating a newly implemented attendance policy.

[1] The Respondent filed a bare exception, asserting that the judge erred by giving "no weight" to Union Business Manager Jay Cowick's testimony. The Respondent also filed bare exceptions to the judge's (a) denial of its petition for writ of habeas corpus to depose a former employee in jail; (b) exclusion of documents related to former employee Cynthia Arledge's workers' compensation claim; and (c) denial of its motions (1) for a continuance, (2) for a recess pending interlocutory appeal, and (3) to strike the General Counsel's exhibits apparently offered to show disparity in treatment rather than to identify improperly altered documents. The Respondent presented no argument in support of these exceptions. Accordingly, we find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that these exceptions should be disregarded. See, e.g., *New Concept Solutions, LLC*, 349 NLRB No. 106, slip op. at 1 fn. 2 (2007).

[2] The Respondent requests oral argument limited to the judge's award of litigation costs. The Board denies requests for oral argument where "the record, exceptions and briefs adequately present the issues and the positions of the parties." See, e.g., *Dean Transportation, Inc.*, 350 NLRB No. 4, slip op. at 1 fn. 1 (2007). Here, the record is extensive, and the exceptions and briefs present the issues and the parties' respective positions. In any event, because we have decided, as explained below, that an award of litigation costs is not warranted here, there is no need for the Respondent to argue orally in opposition to such an award. Accordingly, we deny the Respondent's request for oral argument.

[3] The General Counsel did not except to the judge's denial of his motion to amend the complaint to add a *Johnnie's Poultry* allegation. See *Johnnie's Poultry Co.*, 146 NLRB 770 (1964) (setting forth safeguards under which questioning of employees, under specified circumstances, on matters involving Sec. 7 rights will be privileged), enf. denied 344 F.2d 617 (8th Cir. 1965). The General Counsel also did not except to the judge's refusal to strike Union Representative Cowick's testimony. Finally, the General Counsel did not except to the judge's refusal to strike the testimony of 15 Respondent witnesses. (The judge found "no relevance in" and placed "no reliance upon" that testimony.)

[4] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] We will modify the recommended Order to conform to our findings herein and in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996).

[6] Hereinafter, all references to "Scott" are to James Scott unless otherwise indicated.

[7] All dates are in 2002 unless otherwise indicated.

[8] In *Sunshine I*, the Board affirmed the judge's finding, inter alia, that the Respondent unlawfully laid off five employees. Huggins was not one of the five.

The complaint, as amended at hearing, alleged that the Respondent violated Section 8(a)(1), (3), and (4) by taking these employment actions against Huggins. The complaint also alleged that the Respondent violated Section 8(a)(1) by threatening Huggins on September 4 that the Respondent no longer wanted him employed due to his adverse testimony. Finally, the complaint alleged that from August 30 until the Respondent discharged Huggins on September 30, the Respondent violated Section 8(a)(3) by failing to take action in response to harassment of prounion employees (Huggins was the target of the alleged harassment). The judge denied, as untimely, the General Counsel's motion to amend the complaint to allege that the Respondent's implementation of a new, stricter attendance policy on May 6 was in response to the union activity of its employees and thus also violated the Act.

In her original decision issued on June 30, 2003 (*Sunshine II*), the judge found that the Respondent violated Section 8(a)(1), (3), and (4) by discriminatorily issuing Huggins the performance-based disciplinary warnings, but did not violate the Act by disciplining, suspending, and terminating Huggins under the new attendance policy. Specifically, the judge found that the General Counsel established an initial case under *Wright Line*[9] that animus against Huggins' protected activity was a motivating factor in the Respondent's attendance-related actions, but that the Respondent rebutted that case by demonstrating that it would have taken those employment actions against Huggins even absent his protected activity. The judge based this latter finding on both testimony and over 200 documents introduced into evidence by the Respondent purporting to demonstrate that it treated Huggins in accordance with the new attendance policy and that it applied the policy consistently to all employees. The judge dismissed allegations that the Respondent violated Section 8(a)(1) by threatening Huggins that the Respondent no longer wanted him employed and by failing to take action to stop other employees from harassing Huggins.[10]

On August 25, 2003, the General Counsel filed exceptions and a supporting brief, arguing that the judge (1) improperly denied his motion to amend the complaint to allege, and consequently failed to find, that the Respondent violated Section 8(a)(1) by implementing a stricter attendance policy;[11] and (2) wrongly concluded that the Respondent did not violate Section 8(a)(1), (3), and (4) by disciplining and ultimately terminating Huggins for attendance policy violations. Regarding Huggins' termination, the General Counsel contended that the judge erred in finding that the Respondent did not provide shifting reasons for the discharge.

On September 24, 2003, the Respondent filed an answering brief, a motion to strike portions of the General Counsel's exceptions brief,[12] and limited cross-exceptions. The Respondent contested the judge's findings that it (1) harbored antiunion animus, and (2) violated Section 8(a)(3) by issuing Huggins the four performance-based warnings. The Respondent stated that its "limited cross-exceptions are filed out of an abundance of caution," and that it would withdraw its cross-exceptions if the Board denied the General Counsel's exceptions.[13]

Shortly before the judge issued her decision, the Charging Party Union, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366, informed the Region that it had been contacted by one of the Respondent's former employees, Cynthia Arledge. Arledge, who had testified for the Respondent at the 2003 hearing, had come forward to allege that Scott had altered attendance records to hide the Respondent's disparate treatment of Huggins. Allegedly fearing retaliation by Scott, Arledge initially refused to provide testimony when subpoenaed. However, Arledge subsequently complied with a federal district court order granting the Region's application for enforcement of its subpoena, and provided deposition testimony on November 25, 2003.[14] On March 1, 2004, the General Counsel filed

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[10] The General Counsel did not except to the judge's dismissal of these allegations.

[11] The General Counsel argued, among other things, that the judge failed to consider that, because the new policy was the basis for Huggins' discipline and termination, its implementation is "closely related" to the complaint allegations. We find no merit in this argument, for the reasons explained by the judge in denying the motion.

[12] The Respondent argues that the General Counsel, in certain portions of his brief, strayed beyond the bounds of professional, permissible advocacy by playing "fast and loose" with sworn testimony and by "inflammatory argument and improper misrepresentation." The General Counsel opposed the motion. Although we deny the Respondent's motion to strike the selected portions of the General Counsel's brief, we adopt the Respondent's suggested alternative—that is, to give no consideration to these arguably inaccurate, inappropriate, and/or inflammatory passages.

[13] By letter dated July 11, 2003, the Respondent had advised the Board that it accepted the judge's ruling and had rescinded and removed the performance-based warnings given to Huggins. However, after the General Counsel filed his exceptions, the Respondent filed its limited cross-exceptions.

[14] The Region requested and was granted permission to file the application for enforcement of the subpoena under seal. In a subsequent letter notifying Arledge that she was required to provide testimony, the General Counsel explained that, because subpoena enforcement documents had been filed "under seal," the enforcement of the subpoena "would not be made public." The Respondent was not informed that

a motion to reopen the record to allow the submission of this newly discovered evidence; the Respondent opposed this motion. In May 2004, the Board referred the General Counsel's motion, and the Respondent's opposition thereto, to the judge, who granted the motion and reopened the record.[15] A 6-day supplemental hearing ensued. The judge subsequently issued a supplemental decision, finding that the Respondent also violated Section 8(a)(1), (3), and (4) by disciplining and terminating Huggins for his attendance violations (*Sunshine III*). Key to the supplemental decision is the judge's crediting of Arledge's testimony that the Respondent had altered attendance records to "cover its disparate treatment of Huggins," and her consequent finding that the Respondent's attendance records could not be relied upon "as accurate and genuine representations of Respondent's administration of its attendance policy." The judge thus "amended" her earlier decision to find that the Respondent had failed to meet its *Wright Line* rebuttal burden to demonstrate that it would have disciplined and terminated Huggins under the attendance policy even in the absence of his protected activity. In addition, the judge found that the Respondent's litigation of this case based on documents "knowingly altered . . . in anticipation of litigation" constituted "bad faith" and recommended that the Respondent be ordered to pay the General Counsel's "costs and expenses incurred in the investigation, preparation, and conduct" of the supplemental hearing under the "bad faith" exception to the American Rule.[16] The Respondent filed numerous exceptions, and it vigorously contests the judge's award of legal fees. The General Counsel filed cross-exceptions.

II. SUNSHINE II

The alteration-of-documents allegation that precipitated *Sunshine III* related only to Huggins' attendance-related discipline and termination. Before we reach the attendance-related issues (and the judge's award of litigation costs to the General Counsel), we address the unrelated *Sunshine II* issues.

For the reasons stated by the judge, we adopt her findings in *Sunshine II* that the Respondent harbored antiunion animus and violated the Act by discriminatorily issuing the performance-based warnings to Huggins. In adopting the judge's findings, we agree that Superintendent Steven Phelps' comment to Huggins that Scott "hated [Huggins] being 'out there' because he had testified for the Union," even if not independently violative of Section 8(a)(1), demonstrates animus. We also note particularly the judge's findings that (1) prior to his August 26 testimony, Huggins had never received any performance-related discipline, and immediately thereafter, Scott reassigned Huggins to a task at which he knew Huggins had previously failed, effectively setting Huggins up for failure; and (2) the Respondent had tolerated (even rehired) other employees whose mistakes had *actually* caused the Respondent to incur significant expense, while disciplining Huggins for a mistake that *could have* resulted in significant expense had it not been caught by the quality control supervisor. Accordingly, we adopt the judge's findings that the Respondent's asserted reasons for issuing the performance-based discipline were pretextual, that antiunion animus motivated the Respondent to issue this discipline, and that the Respondent thereby violated the Act.[17]

Arledge was going to be deposed. The Respondent argues that these "secret proceedings" violated its due process rights.

[15] The Respondent filed a motion to dismiss reopening of the record, and the judge issued a second Order finding no basis upon which to rescind her earlier Order. The Respondent excepts to the judge's ruling denying its motion to dismiss reopening the record, arguing that its procedural due process rights were violated by the "secret" nature of these proceedings. We affirm the judge's ruling that the General Counsel satisfied the Board's requirements for reopening a record on the basis of newly discovered evidence. See Board Rules & Regulations Sec. 102.48(d). Thereafter, the Respondent had a full opportunity, in the supplemental hearing, to cross-examine Arledge and otherwise to litigate the issues raised by her claim that attendance records were altered. Indeed, the Respondent did, in fact, litigate those issues vigorously. Thus, we reject the Respondent's due process argument.

[16] The "American Rule" is that the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). In addition to express statutory or contractual bases for shifting fees, courts have developed three exceptions to the American Rule: (1) willful disobedience of a court order, (2) bad faith (in a court proceeding), and (3) recovery of costs from a common fund, incurred in preserving or recovering that fund. Id. at 257–259.

[17] As noted above, the General Counsel argued that, in finding that the Respondent did not violate the Act by terminating Huggins, the judge erred in concluding that the Respondent did not provide shifting reasons for the termination. We find no merit in this exception. Huggins admitted that the Respondent discussed his unexcused attendance infractions with him prior to termination, told him that another unexcused absence would lead to termination, and reiterated, when terminating him, that the reason was too many unexcused absences. The record as a whole supports the judge's finding that the Respondent's asserted basis for discharge was consistent. Contrary to the General Counsel's suggestion, the Respondent relied on employee testimony in the record regarding Huggins' attitude and complaints, not to explain the basis of Huggins' discharge, but to support the argument that it treated Huggins fairly; indeed, if anything, it treated Huggins better than it treated other employees. Although we find no merit in the General Counsel's argument that a violation should be found on the basis that the Respondent offered shifting reasons for Huggins' discharge, the issue still remains whether the Respondent sustained its burden of showing that it would have discharged Huggins for attendance infractions even in the absence of his union activity. We discuss that issue in connection with *Sunshine III*, below.

III. SUNSHINE III

A. The attendance policy

Scott testified that he decided to implement a new attendance policy, and to take control of attendance himself, because his supervision had let him down. On May 6, the Respondent implemented a new written policy and erased all outstanding attendance infractions. The new policy provides for progressive discipline (verbal warning, written warning, suspension, discharge) for four types of infractions (unexcused absence, tardy, leave early, or timecard discrepancy). Thus, four unexcused infractions of the same type occurring within the applicable calendar period results in discharge. The policy specifies that (1) each incident of excessive absenteeism or tardiness shall be evaluated on a case-by-case basis; (2) absences may be excused when the employee follows call-in procedures and returns to work with supporting documentation, and when prescheduled with prior management approval; (3) where appropriate, the employer will require documentation of authorized reasons; and (4) although calling in does not excuse an unscheduled absence, mitigating and extenuating circumstances may be weighed prior to the imposition of discipline. Scott explained that, even if an employee submitted a request for leave in advance, the request was not automatically granted.

As the judge's decision discusses, Scott and his son, Kevin, initially reviewed daily compliance with the attendance policy. However, Arledge became involved during the first 6 months to relieve the Scotts from this daily duty. Arledge was charged with obtaining followup information and documentation. Originally, if an employee provided proper documentation to Arledge, an infraction was excused without Scott's involvement. If, however, Arledge had concerns, she took the issue to Scott for review. Ultimately, the Respondent's human resources and safety director, John Goldberg, was assigned to administer the policy.

B. The "collateral evidence"

The judge relied primarily on Arledge's testimony, as corroborated by Phelps, to find that the Respondent had altered its attendance records. The Respondent attacked this testimony by cross-examining Arledge and Phelps concerning drug-related activity and other misconduct while they were employed by the Respondent, and by calling a number of witnesses who testified regarding Arledge's and Phelps' use of drugs and/or drug dealing at the workplace, Arledge's participation in a court-ordered drug rehabilitation program, Phelps' use of his supervisory position to intimidate and control employees, Phelps' status as a "lead suspect" in a break-in at the Respondent's plant, and Arledge's filing of a workers' compensation claim. The judge rejected the Respondent's arguments that this evidence was offered on grounds other than to attack Arledge's and Phelps' credibility, or that it was admissible to show bias, motivation, or lack of competency, or to impeach by contradiction.[18] As noted above, the judge denied the General Counsel's motion to strike this "collateral evidence." She did, however, state that the testimony was irrelevant and that she did not rely on it.

The Respondent excepted, arguing that the judge erred by failing to consider the evidence concerning Phelps and Arledge to discredit them on the basis of bias, motivation, incompetency, and/or impeachment by contradiction. As explained below, we find that the judge acted properly within her discretion in refusing to consider this evidence.

For purposes of review, we will treat the judge's ruling in this regard as substantially equivalent to a ruling excluding the testimony from the record. "Under Section 10(b) of the Act and Section 102.39 of the Board's Rules and Regulations, the Federal Rules of Evidence [FREs] apply insofar as practicable to unfair labor practice proceedings[.]" *J. S. Troup Electric*, *Inc.,* 344 NLRB 1009 (2005). Both the courts and the Board review rulings excluding evidence for an abuse of discretion. See, e.g., *U.S. v. Harris*, 491 F.3d 440, 446–447 (D.C. Cir. 2007); *J.S. Troup Electric*, supra at 1009–1010.

Under FRE 608(b), the use of "extrinsic" evidence of a witness' conduct to impeach the witness is generally prohibited, but inquiry into specific instances of conduct is allowed on cross-examination if, in the discretion of the court, such conduct is probative of truthfulness or untruthfulness. *Operating Engineers Local 17 (Hertz Equipment Rental)*, 335 NLRB 578, 583 fn. 11 (2001); *Saddle West Restaurant*, 269 NLRB 1027, 1036 (1984); *U.S. v. Tarantino*, 846 F.2d 1384, 1406 (D.C. Cir. 1988), cert. denied 488 U.S. 840, 867 (1988). Where a witness responds to such an inquiry, Rule 608(b) generally does

[18] The judge reasoned that the testimony dealt with matters unrelated to whether the Respondent altered attendance records, and thus there was "no basis to consider this evidence as impeachment by contradiction." The judge also rejected the Respondent's argument that the collateral evidence demonstrated bias or prejudice, noting that there was no evidence that Phelps harbored hostility toward the Respondent for his layoff or for being questioned by authorities, and that Arledge had quit and contacted the Union regarding the altered documents *before* filing her workers' compensation claim. The judge also rejected the Respondent's argument that Phelps' and Arledge's drug use compromised their ability to accurately recall and relate events, noting that the Respondent trusted Phelps both as its production manager and as its witness in the 2003 hearing, and that Arledge's court-ordered drug screenings minimized the possibility that she was impaired during the relevant time period.

not allow admission of extrinsic evidence of specific acts to attack the witness' response, unless the extrinsic evidence tends to show bias or motive for the witness to testify untruthfully. See *U.S. v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990). However, in such circumstances, the admission of such evidence is left to the sound discretion of the trial court. Id.

Preliminarily, the judge could have altogether precluded the Respondent from cross-examining Phelps and Arledge concerning their drug-related acts. Courts have consistently held that such acts are not probative of truthfulness or untruthfulness. 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6118, at 107 (1993 & Supp. 2007) (citing cases). The judge allowed the questions, however, and Arledge and Phelps both denied using or selling drugs in the workplace. Under FRE 608(b), the Respondent had to accept their denials unless extrinsic evidence tended to show that Phelps and Arledge were biased or possessed a motive to testify untruthfully. See *U.S. v. Thorn*, supra. We find no such bias or motive. Here, as the judge found, there is no evidence that Phelps harbored hostility toward the Respondent for his layoff or for being questioned by authorities.[19] As the judge also noted, Arledge had quit her job and contacted the Union regarding the altered documents *before* filing the workers' compensation claim that the Respondent contested. Moreover, there is no basis for finding that Phelps and Arledge lost their access to drugs as a result of being separated from employment with the Respondent, which arguably might have biased them against the Respondent or motivated them to testify untruthfully. Accordingly, the judge did not abuse her discretion in declining to rely on the collateral evidence for the purpose of demonstrating bias or motive to testify untruthfully.

Under FRE 404(b), evidence of "other crimes, wrongs or acts" is not admissible to prove character to "show action in conformity therewith," but may be admitted as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." See, e.g., *U.S. v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999), cert. denied 532 U.S. 965 (2001). To determine whether such evidence is admissible, courts will consider, among other things, whether the evidence tends to prove a material point and whether the past act is similar to the offense charged. Id.[20] In *U.S. v. Cameron*, 814 F.2d 403, 405–406 (7th Cir. 1987), the court of appeals upheld the district court's refusal to allow evidence of a witness' prior drug use offered to make a "general character attack," and of a misdemeanor conviction on a charge not considered a "crime of dishonesty" as probative of the witness' propensity to lie under oath.

Here, whether Phelps and Arledge previously engaged in drug use and/or dealing was not a material issue in the case. Nor was their alleged misconduct a "crime of dishonesty" (such as forgery) tending to impugn their credibility. See *Wright & Gold*, supra. Rather, consistent with *U.S. v. Cameron*, supra, evidence of Phelps' and Arledge's prior drug use is not probative of their propensity to lie under oath. The judge did not abuse her discretion by declining to consider it.

The Respondent also relies on the principle of impeachment by contradiction. Impeachment by contradiction attempts to show the falsity of specific testimony by introducing contradictory evidence. *U.S. v. Castillo*, supra at 1132. A district court has broad discretion over whether to admit extrinsic evidence to impeach a witness' direct-examination testimony, particularly on a matter collateral to the case. *U.S. v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993), cert. denied 511 U.S. 1035 (1994). However, it is generally improper to admit extrinsic evidence to impeach testimony that was invited by questioning during cross-examination. See *U.S. v. Castillo*, supra at 1133–1134.

Here, as the judge found, Phelps' and Arledge's denials of drug use and sale were elicited on cross-examination. Thus, the judge properly declined to rely on the Respondent's witnesses' testimony offered to contradict their denials. See, e.g., *U.S. v. Antonakeas*, 255 F.3d 714, 724 (9th Cir. 2001). Even if Phelps and Arledge had, on direct, volunteered testimony showing drug-related misconduct in the workplace, the judge had broad discretion over whether to admit that evidence, as it concerned a matter collateral to the case. See *U.S. v. Chu,* supra; *Ponderosa Granite Co.*, 267 NLRB 212, 212 fn. 1 (1983) (ruling that, even if the deputy sheriff's testimony were to be considered solely as evidence contradicting discriminatee's testimony on the number of bad check warrants issued against him, it should have been excluded as involving merely a collateral matter).

The Respondent also argues that Phelps' and Arledge's prior drug use should be considered in assessing their ability to recall and relate events. Prior drug use may be relevant to a witness' capacity to observe events. See

[19] Moreover, the fact that Phelps was questioned by authorities about the break-in does not establish a predisposition to untruthfulness. *Operating Engineers Local 17*, supra.

[20] See also *U.S. v. Cardenas*, 895 F.2d 1338, 1345–1346 (11th Cir. 1990) (evidence of appellant's prior distribution and use of cocaine admissible under both FRE 404(b) to prove intent and 608(b) to contradict witness' testimony on material issue); *U.S. v. Mateos-Sanchez*, 864 F.2d 232, 235 (1st Cir. 1988) (in drug case, evidence of past drug use could be probative of motive, knowledge, or absence of mistake or accident).

U.S. v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980). However, the party seeking to introduce such evidence must establish a foundation showing that the witness either was using drugs at the time he observed the events in question, or was under the influence of drugs while testifying. Id. at 667. Here, the Respondent has not shown that either Phelps or Arledge was using drugs during the incidents about which they testified or while they were on the stand. Accordingly, we reject the Respondent's argument in this regard.

Finally, even assuming that the judge could have considered the collateral evidence under any of the rules and principles discussed above, nothing required her to do so. As noted above, decisions on admissibility are reviewed for an abuse of discretion. As the evidence at issue here involved collateral issues and was not probative of Phelps' and Arledge's propensity to testify untruthfully concerning the material issue in this proceeding—alteration of attendance records—we conclude that the judge did not abuse her discretion by declining to rely on this evidence.

C. Altered Documents and Respondent's Wright Line Burden

The judge outlined various changes that Arledge testified she had made at Scott's direction to a number of employees' attendance files. According to Arledge, these changes were made so that the Respondent would not appear biased in its administration of the attendance policy. Phelps testified that he had observed Arledge and Scott reviewing attendance records and had been asked to re-sign some forms. Scott acknowledged that he and Arledge conducted a 6-week review of, and retroactively changed, attendance records,[21] but he testified that the changes were necessary to correct errors Arledge had made or to update the records as employees submitted supporting documentation that would excuse their infractions. The judge credited Arledge over Scott, based on her reluctance to testify, Phelps' corroborating testimony, and Scott's "motivating . . . concern about going to court." The judge thus found that the Respondent, anticipating a Board hearing in this matter, "altered, created, and destroyed attendance records" to cover its disparate treatment of Huggins. Having so found, she amended her earlier decision, premised on a lack of disparate treatment, to find that the Respondent failed to meet its *Wright Line* rebuttal burden of showing that it would have disciplined and discharged Huggins under its attendance policy even in the absence of his union activity and testimony in a Board proceeding. Thus, the judge found that the discipline and discharge violated Section 8(a)(1), (3), and (4).

The Respondent excepts.[22] It repeats its argument that any alterations properly corrected mistakes or updated documentation. The Respondent emphasizes that the judge did *not* find that Huggins' records or the records of five other employees terminated under the attendance policy were altered. Moreover, the Respondent argues that nothing in the reopened record changes the undisputed fact that Huggins had four unexcused absences, grounds for termination. Thus, the Respondent argues, it met its *Wright Line* burden.

Preliminarily, we observe that the complicated record in this case is susceptible to multiple interpretations. It is one thing to find that records were altered, another to find that they were altered to hide disparate treatment, and yet another to find that they were altered for the express purpose of hiding discrimination based on Section 7 activity. Crediting Arledge as to the reason for the alterations (to cover disparate treatment) does not, in and of itself, answer the ultimate legal question as to the reason for Huggins' discipline and termination (whether Scott acted with discriminatory motive based on Huggins' union activity). Moreover, the Respondent's evidence offered to rebut a finding of discriminatory motivation also relates to the issue, discussed below, of whether the Respondent engaged in "bad-faith" litigation justifying an award of legal costs to the General Counsel. Thus, further discussion is warranted.

First, although we find no abuse of discretion in the judge's disregard of "collateral evidence," the judge denied the General Counsel's motion to strike that evidence and the General Counsel did not except to the judge's ruling. Thus, the evidence remains in the record. Based on that and other record evidence, it is difficult to view Phelps' and Arledge's testimony uncritically. It is plausible that Phelps was, as witnesses here testified, selling or trading excused absences for drugs, thereby effectively thwarting the Respondent's new attendance policy,

[21] Huggins was fired in late September 2002. The Union filed a charge on October 4. Scott testified that the review was conducted in October.

[22] The General Counsel also cross-excepts, arguing that the judge failed to find that GC Exhs. 2 and 22 (1) demonstrate that the records that the Respondent presented at hearing were not the records that were maintained in the ordinary course of business, i.e., had been altered, and (2) provide a basis, separate and apart from the evidence regarding altered documents, upon which to find that the Respondent disparately applied its attendance policy against Huggins. The General Counsel also argues that the judge failed to further support her disparate treatment finding with other exhibits introduced by the General Counsel to show that, although Huggins was required to submit documentation for each of his attendance violations, other employees were excused without documentation. Because, as discussed below, the Respondent failed to meet its *Wright Line* burden of proof, we find it unnecessary to pass on these cross-exceptions.

which was designed to address what appears to have been a genuine and widespread attendance problem at the plant.[23] If Phelps was doing so, Scott would have had a further reason, in addition to correcting mistakes and updating in light of subsequent documentation, for auditing and correcting the attendance records. Viewed in this light, Scott's statement, from which the judge inferred unlawful motive, that he audited those records because he knew he would be the one "standing before the judge" is amenable to an innocent interpretation.

Second, Arledge's attribution of unlawful motive to Scott because he altered documents suffers from her own admissions that (1) she did not necessarily know everything Scott knew, and (2) she and Scott had several "disagreements" over Scott's application of the attendance policy.[24] As to the former, Scott testified that he changed some "unexcused" infractions to "excused" to account for situations where, for example, he had granted an employee prior permission to be late or absent,[25] or had sent an employee on an errand. As to the latter, what Arledge viewed as Scott treating employees unfairly under a "buddy system," Scott apparently viewed as legitimately exercising his discretion, as the written attendance policy allowed, to review extenuating circumstances in deciding whether to excuse an infraction.[26] Thus, certain of Arledge's characterizations of Scott's review of the records—e.g., "Scott was looking to see whether he liked that excuse, whether that was what's supposed to be on there," or Scott was "fixing" a file[27]—could be interpreted just as the Respondent argues: Scott was correcting mistakes and legitimately exercising permitted discretion under the policy.

The General Counsel's case is premised on the theory that the Respondent altered documents to hide its discrimination against Huggins, and that Scott perjured himself in *Sunshine II* when he testified that the Respondent's records placed in evidence were true and accurate representations of the original documents. But if, as Scott claims, he merely corrected mistakes or updated records as appropriate documentation was provided, it can be argued that his testimony in this regard was not necessarily untruthful.

Moreover, embedded in the General Counsel's argument are two arguably fallacious assumptions: (1) any alterations to the attendance documents prior to the hearing were wrong and/or inappropriate, and (2) alterations prove unlawful discrimination against Huggins. The first assumption ignores the fact that Scott had discretion under the policy to decide what was and was not excused, and it discounts any possibility that past mistakes or additional documentation may have warranted further exercise of that discretion. Even assuming that some alterations were improper, the second assumption disregards the possibility that such changes may have been made merely to hide the fact that Scott had inconsistently applied the attendance policy to favor his "buddies." This would show unfairness, but it would not prove discrimination based on Section 7 activity.

On the other hand, and contrary to the Respondent's argument, the mere fact that Huggins had four unexcused absences does not sustain the Respondent's *Wright Line* rebuttal burden. An employer does not carry its burden merely by showing that it had a legitimate basis for taking an adverse employment action; it must persuade that it would have taken the same action even in the absence of protected activity. See, e.g., *T&J Trucking Co.*, 316 NLRB 771 (1995); *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). The Respondent is well aware of this principle; indeed, that is why it introduced documentary evidence purporting to demonstrate its consistent application of the attendance policy. But the admitted fact that those records were altered obviously throws a wrench into the Respondent's *Wright Line* rebuttal case.

[23] We note that in *Sunshine Piping I*, Judge Carson explicitly discredited Phelps, stating that Phelps was not clear, convincing, or credible and that he "was not impressed by [Phelps'] demeanor."

[24] Arledge's testimony is also weakened by her admission that she was "very confused" during the months she worked with Scott changing records, that she "can't remember dates well," that she "thinks" a number of files were changed, and that she "couldn't really recollect" if she had changed forms in certain files. Moreover, we do not share the judge's view that Arledge's emotional volatility necessarily enhanced her credibility.

[25] For example, regarding GC-20, Arledge testified that the absence was initially documented as "unexcused," and she had written "employee would not give me paperwork" on the disciplinary action form. When the records were reviewed, paperwork was attached and the incident was changed to "excused, prior permission." Arledge admitted that she did not know if the employee had asked "ahead of time" to be excused.

[26] For example, Arledge testified that Scott originally exempted two employees in the shipping department from the policy and later "unexempted" one of them. Scott testified, however, that they were never exempt, but that he sometimes used his discretion to allow them to come in late if they had worked late the night before. As an example of Scott's purported use of a "buddy system," Arledge testified about an employee whose tardiness was excused when he rode his bike to work in the rain, as opposed to another employee whose tardiness was not excused when she took a taxi to work. Scott explained that he excused the bike-rider because he had passed him as he [Scott] drove to work, he admired the employee's efforts, and the employee was only one minute late and had a good overall attendance record. But even assuming Scott's treatment of the bike-rider versus the taxi-taker was disparate, it does nothing to show that Huggins was discriminated against *because of* his protected or union activities.

[27] "Fixing" can be interpreted more than one way.

Ultimately, the issue is whether the Respondent sustained its burden under *Wright Line*. The judge found that the General Counsel met his initial burden, and we affirm that finding. The inference of discriminatory motivation stands unless the Respondent rebuts it.[28] Respondent sought to rebut it by showing that it acted adversely against Huggins because he violated the attendance policy, which policy was fairly applied to all employees. But it did so with records that were indisputably altered. The judge found, and we agree, that those records cannot be relied upon "as accurate and genuine representations of Respondent's administration of its attendance policy." And, without evidence showing how it *really* administered its attendance policy, and worse, with credited evidence that alterations were made to cover disparate treatment, Respondent necessarily fails to sustain its rebuttal burden. Accordingly, we adopt the judge's conclusion that her previous determination that the Respondent met its *Wright Line* rebuttal burden must be reversed.

D. Judge's award of litigation costs

1. Motion to amend to request special remedies

On the fifth day of a 6-day hearing, and 9 weeks after the *Sunshine III* hearing commenced, the General Counsel moved to amend the complaint to include a request for special remedies. Specifically, the General Counsel moved to add a request that the Respondent be ordered to pay the General Counsel's "costs and expenses incurred in the investigation, preparation, and conduct" of the supplemental hearing. The judge granted the motion, rejecting the Respondent's argument that allowing the amendment would violate the Respondent's due process rights. The judge stated that although the General Counsel's timing may have lacked basic courtesy, the issue of whether the Respondent had altered its attendance records had been fully litigated, and the Respondent did not show that it would have defended its case any differently had special remedies been requested earlier. The Respondent excepts to this ruling.

Section 102.17 of the Board's Rules and Regulations provides, in pertinent part, that a complaint "may be amended upon such terms as may be deemed just . . . at the hearing and until the case has been transferred to the Board . . . , upon motion, by the administrative law judge designated to conduct the hearing[.]" The basic requirements of due process with respect to the assessment of costs, expenses, or attorney fees are notice that such sanctions are being considered and an opportunity to respond. *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006). The precise procedural protections of due process vary, depending on the circumstances, because due process is a flexible concept unrestricted by any bright-line rules. Id.

Here, before the hearing closed, the Respondent was given notice that the General Counsel was seeking attorneys' fees.[29] It cross-examined those witnesses who testified that documents had been altered, and it opposed the request for litigation costs in its brief. Thus, the Respondent had notice and an opportunity to respond. The Respondent cites numerous cases in which last-minute complaint amendments were refused, but in those cases the amendments sought would have added a new claim or theory, which in turn would have required the defendant to revise its defense.[30] The Respondent has not shown that the judge's decision to grant the amendment prejudiced its ability to mount a defense on the issue of attorneys' fees or any other issue. Thus, the judge did not abuse her discretion by granting the amendment.

2. Appropriateness of fee award

Summarizing Board precedent concerning the standards to be applied in determining whether an award of litigation costs is warranted, the judge stated that the Board "primarily" grants such an award "only in cases involving frivolous defenses and in cases involving unfair labor practices that are flagrant, aggravated, persistent and pervasive." The judge further explained, citing *Heck's Inc.*, 215 NLRB 765, 768 (1974), that a respondent's defenses will be considered "debatable" rather than "frivolous" if they turn on credibility. The judge observed that "because credibility is paramount in this case, it may be argued that Respondent's defenses are debatable and thus the award of litigation costs would not be appropriate." She determined, however, that a "frivolous" versus "debatable" analysis did not address the circumstances of this case. Accordingly, without passing on whether the Respondent's defenses were "frivolous" or "debatable," the judge awarded litigation costs to the General Counsel based upon the "bad faith"

[28] The inference gains force from Scott's statement that he hated Huggins being "out there," the work-performance warnings that we have found violated the Act, a full-record review taking at least 6 weeks, and Arledge's sincerely held belief that she had done something wrong (as shown by her initial invocation of the Fifth Amendment). These factors, taken together, suggest that Respondent's review and alteration of its records sprang from something *other* than a pure desire to correct mistakes, i.e., a desire to hide its discriminatory motive in disciplining and terminating Huggins.

[29] See *Folsom Ready Mix, Inc.*, 338 NLRB 1172, 1172 fn. 1 (2003) (amendments made during hearing were not so late as to prejudice respondent).

[30] For example, in *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), cited by the Respondent, the court reversed several of the Board's unfair labor practice findings where the violations had not been alleged in the amended complaint.

exception to the American Rule.[31] The judge reasoned that this case was reopened because there was "credible evidence that the Respondent knowingly altered its records in anticipation of litigation," and that such actions reflected bad faith in the conduct of the litigation.[32]

The Respondent excepts, arguing primarily that the Board has no authority to award litigation costs based upon the "bad faith" exception to the American Rule because that exception is based upon a federal court's inherent power to punish an abusive litigant—a power the Board lacks.[33] Even assuming the Board has such authority, the Respondent also argues that the judge erred by finding that it acted in bad faith. We find merit in the latter argument.[34]

"The bad faith exception permits an award upon a showing that the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons. Neither meritlessness alone, nor improper motives alone, will suffice." *Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985) (internal quotations and citations omitted); see *Frontier Hotel & Casino*, 318 NLRB 857 (1995) (finding bad faith where respondent rested its defense on transparently untruthful testimony of witness), enf. granted in part and denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

As stated, the General Counsel seeks an award of costs incurred in investigating, preparing for, and conducting the hearing in *Sunshine III*. The premise of such an award would be that the Respondent was guilty of bad faith in presenting a defense in *Sunshine II* based on altered attendance records. As discussed above, those alterations may be variously explained as (1) legitimate corrections, (2) an effort to conceal an unfair but not necessarily unlawful administration of the attendance policy on a "buddy system," or (3) an effort to conceal unlawful discrimination motivated by Huggins' protected activity.

As explained above, for the purpose of deciding whether Huggins' attendance-related discipline and discharge violated the Act, the Respondent's alteration of documents negates its ability to meet its *Wright Line* rebuttal burden, i.e., to persuade that it would have taken the same action against Huggins even in the absence of his Section 7 activity. But for purposes of deciding whether the Respondent was guilty of bad faith in presenting a defense based on altered attendance records in *Sunshine II*, the fact that the alterations are amenable to conflicting explanations is significant. As detailed above, the record raised questions regarding (1) whether documents were appropriately corrected or improperly altered, and (2) if improperly altered, the motive to be ascribed to the alterations. Scott's account of why he altered attendance records was not devoid of plausibility. Nor was it clear that Scott knowingly testified untruthfully when he said the attendance records were accurate, as he could have meant they were accurate *as corrected*.[35] His testimony certainly was not "transparently untruthful." See *Frontier Hotel & Casino*, supra at 861. And as we have also explained, Arledge's explanation of Scott's actions was not entirely unproblematic.

In *Sunshine III*, of course, the judge credited Arledge over Scott that changes were made to hide disparate treatment of Huggins. But that does not mean that, at the time of the *Sunshine II* hearing, the Respondent acted wantonly or vexatiously in mounting its defense.[36] Where the Board has found an award of costs warranted based on bad faith, the offending party's litigation conduct was knowingly vexatious at the time it was committed.[37] Here, by contrast, we cannot say that at the time

[31] The judge's treatment of this issue was not inconsistent with Board precedent. For example, in *675 West End Owners Corp.*, 345 NLRB 324, 326 (2005), the Board ordered a hearing on litigation costs, based on bad faith in the conduct of the litigation, without addressing the *Heck's* "frivolous versus debatable" standard.

[32] In awarding litigation costs, the judge cited precedent in which the Board relied, in part, on Sec. 10(c) of the Act as a basis for awarding attorney fees. The Respondent excepted, arguing that because Sec. 10(c) does not expressly authorize fee-shifting, the Board cannot rely upon that statutory provision to award litigation expenses. We do not read the judge's decision as relying upon Sec. 10(c), and the General Counsel does not argue Sec. 10(c) as a basis for awarding litigation costs. Moreover, as explained below, we will reverse the fee award. Accordingly, we need not pass on this exception.

[33] The Respondent also argues that a Board award of litigation costs would be unconstitutional under separation-of-powers principles.

[34] Because we find, for the reasons that follow, that the Respondent did not litigate the attendance-related issues in *Sunshine II* in bad faith, we need not address the Respondent's contention that the Board lacks authority to base a fee award on bad faith. We also need not pass on the Respondent's contention that the judge erred by failing to find that its defense was "debatable" rather than "frivolous." The party seeking the award – the General Counsel – is content to rest on the judge's "bad faith" rationale; he does not except to the judge's failure to find that the Respondent's defense was frivolous. Thus, having found (as we do below) that Respondent did not litigate in bad faith, the fee-award analysis properly ends there.

[35] We recognize that the Respondent's failure to divulge its audit of attendance records up front in *Sunshine II* is suspect. Nonetheless, that failure alone does not compel a finding that its defense was wantonly asserted.

[36] Cf. *Frontier Hotel & Casino*, supra at 861 (affirming the principle that the need to evaluate the credibility of witnesses ordinarily renders a defense debatable rather than frivolous).

[37] See *675 West End Owners Corp.*, supra. at 326 (finding bad faith where respondent's counsel willfully disobeyed judge's instructions concerning subpoenas); *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1194 (2001) (finding bad faith where respondent put on no defense and engaged in abusive, 10-day cross-examination of company's general manager); *Lake Holiday Manor*, 325 NLRB 469 (1998) (finding bad faith where respondent repeatedly reneged on set-

the Respondent presented its defense in *Sunshine II*, the *only* reasonable (as opposed to ultimately credited) explanation for its alteration of attendance records was Arledge's explanation. And, as noted earlier, even crediting Arledge that alterations were made to hide disparate treatment, that did not foreclose the possibility that disparateness was based on a "buddy system" rather than protected activity. Moreover, the Respondent had sufficient undisputed evidence of Huggins' absenteeism to make its defense of his termination at least "colorable." Thus, we cannot conclude that the Respondent's defense was "entirely without color" and "wantonly asserted." *Colombrito v. Kelly*, supra. Accordingly, we reject the judge's recommended award of litigation costs to the General Counsel.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as amended by the judge in her supplemental decision and as modified below, and orders that the Respondent, Sunshine Piping, Inc., Cedar Grove, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the succeeding paragraphs accordingly:

"(a) Within 14 days from the date of this Order, offer Robert Huggins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

"(b) Make Robert Huggins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision."

2. Delete paragraph 2(f).

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 31, 2007

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

In contrast to the majority, I would award the General Counsel the costs incurred in investigating, preparing for, and conducting the hearing in *Sunshine III* with respect to the unlawful discipline and discharge of employee Robert Huggins.

The majority complicates what should be a simple issue, delving deeply into the plausibility of the Respondent's defense and of hypothetical motives for its deliberate alteration of attendance records. But there seems to be no question here: (1) that the Respondent altered the records knowing full well that they were relevant to matters before the Board; (2) that the undisclosed (but ultimately uncovered) alteration destroyed the reliability of the records as evidence and necessarily interfered with the Board's ability to determine the truth; and (3) that the General Counsel was forced to incur costs as a direct result of the Respondent's actions, which multiplied proceedings before the Board.

Under such circumstances, the Board—in the interest of controlling its own proceedings and preserving their integrity—surely has the inherent authority to award costs. See generally *675 West End Owners Corp.*, 345 NLRB 324, 326 fn. 11 (2005) (collecting decisions in which Board has awarded litigation costs). Compare *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958-961 (9th Cir. 2006) (discussing inherent authority of federal courts to impose sanctions, including award of attorney's fees, for spoliation of evidence).

Accordingly, I dissent.

Dated, Washington, D.C., December 31, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

tlement agreements and sought to delay hearing at last minute in defiance of judge's instructions).

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for supporting United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Huggins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Huggins whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Robert Huggins' unlawful discipline and discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline and discharge will not be used against him in any way.

SUNSHINE PIPING, INC.

C. R. Rogers, Esq., for the General Counsel.
Tony B. Griffin, Esq. and ***Brett P. Ruzzo, Esq.*** for the Respondent.
Greg Boggs, Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 15–CA–16781 was filed on October 14, 2002[1] by United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366, (the Union). The Union later filed an amended charge on November 5, 2002, as well as a second amended charge on November 14. A third amended charge was filed by the Union on December 23 and a fourth amended charge was filed on January 28, 2003. Based upon the allegations contained in Case 15-CA-16781, the Regional Director for Region 15 of the National Labor Relations Board (herein the Board), issued a Complaint and Notice of Hearing on January 30, 2003. The complaint alleges that Sunshine Piping, Inc., (Respondent), violated Sections 8(a)(1) of the National Labor Relations Act (the Act), by threatening employees by informing them that Respondent did not want them to be employed by Respondent because they had testified against the Respondent. The complaint further alleges that Respondent violated Sections 8(3) and (4) of the Act by issuing a verbal warning to Robert Huggins (herein Huggins) on September 18 as well as written warnings to Huggins on August 30 and September 13 and by suspending Huggins on September 4. The complaint further alleges that Respondent violated Sections 8(a)(3) and (4) of the Act by terminating Huggins on September 30 because of his union and concerted activities and because he filed charges or gave testimony under the Act. Respondent filed a timely answer on February 12, 2003. At the opening of the hearing on April 28, Counsel for the General Counsel moved to amend the complaint to also include allegations that Respondent issued written warnings to Huggins on August 26 and 28. I granted General Counsel's motion. General Counsel also moved to amend the complaint to include the allegation that on or about May 6, Respondent instituted a stricter attendance policy and I denied General Counsel's motion.[2]

A hearing on these matters was conducted before me in Panama City, Florida on April 28, 29, and 30, 2003, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. General Counsel and Respondent filed briefs, which I have duly considered. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

[1] All dates are 2002 unless otherwise indicated.

[2] General Counsel's complaint includes allegations that Respondent violated Sections 8(a)(3) and (4) of the Act by issuing Huggins verbal and written warnings in August and September as well as terminating his employment in September. The parties stipulated that Huggins was hired by Respondent in mid-January 2002 and laid off on March 21. He was recalled on June 3 and later testified in the Board's administrative proceeding in Case No. 15-CA-16530 on August 26. The Board has found that the General Counsel may add complaint allegations that occur outside the 6-month 10(b) period, if they are closely related to allegations in a timely filed charge. In determining whether the new allegations are closely related, the Board considers whether the otherwise untimely allegations are of the same class as the violation alleged in the pending timely charge. The Board also considers whether the untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. Finally, the Board considers whether Respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the allegations in the timely pending charge. *Redd-I, Inc*., 290 NLRB 1115 (1988). Respondent's implementation of its attendance policy preceded Huggins' testimony in the Board proceeding. Further, I note that the attendance policy was implemented almost four months prior to General Counsel's presenting evidence and prosecuting charges in Case No. 15-CA-16530. Accordingly, Respondent's implementation of the May attendance policy does not appear to arise out of the same factual situation or sequence of events as the allegations in the pending timely charge and a reasonable respondent would not have known to preserve similar evidence or prepare a similar case in defending itself against the otherwise untimely allegation as it would in defending against the allegations in the timely pending charge.

FINDINGS OF FACT

I. JURISDICTION

Respondent has an office and a place of business in Panama City, Florida and a facility in Cedar Grove, Florida where it is engaged in building piping used in cooling systems for turbines and electric generating plants. Annually Respondent sold and shipped goods valued in excess of $50,000 to customers outside the state of Florida. During the same period, Respondent purchased and received at its Cedar Grove, Florida facility, goods valued in excess of $50,000 directly from points outside the State of Florida. Respondent admits that for the period of time between June 3, 2002 through September 30, 2002, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. I find Respondent an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union as a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

After testifying in the Board's proceeding in Case 15-CA-16530 on August 26, Huggins received a verbal warning and three written warnings for his work performance on August 26, 28, 30, and September 18, respectively. Huggins additionally received a written warning on September 13, a suspension on September 4, and his termination on September 30 for violations of the attendance policy. General Counsel alleges that all of the discipline administered to Huggins after August 26 was given because of his Union and protected activity and was thus violative of the Act. Additionally, General Counsel alleges that Huggins was threatened on September 4 because he testified against Respondent. General Counsel further alleges that from August 30 until his discharge on September 30, Respondent failed to take action regarding harassment of Huggins. For the reasons set forth below, I find that Respondent issued warnings to Huggins on August 26, 28 and 30 and on September 18 in violation of the Act. I do not find that the record evidence supports that Respondent issued any other discipline to Huggins in violation of the Act nor do I find that Respondent threatened Huggins as alleged or that Respondent failed to take action regarding any harassment of Huggins.

B. Background

Respondent is engaged primarily in the business of building piping used in cooling systems for turbines and electric generating plants. In early June, Respondent employed approximately 68 employees. James Scott is the majority owner of Respondent and is responsible for the day-to-day operation of Respondent, including the formulation and execution of the attendance policy implemented on or about May 6.

Respondent hired Huggins as a welder on January 16. On March 21, Huggins was laid off and then later recalled on June 3. On May 31, the Regional Director for Region 15 issued a complaint against Respondent based upon charges filed by the Union. The complaint contained various allegations of 8(a)(1) conduct as well as an allegation that Respondent discriminatorily laid off 19 employees in March. Based upon the May 31 complaint, a trial was held before Administrative Law Judge George Carson II on August 26, 27, and 28. In his decision that issued on November 1, Judge Carson found that five employees were discriminatorily laid off. Huggins was not included as one of the employees found to be discriminatorily laid off. In his decision, Judge Carson referenced the testimony of Huggins concerning an alleged 8(a)(1) statement by supervisor Steven Phelps. During Huggins' August 26 testimony in the prior proceeding, Huggins testified that he had worn a union sticker on his welding helmet on the day of his layoff.[3]

C. Complaint Paragraph 7

General Counsel alleges that about September 4, Respondent, by Superintendent Steven W. Phelps, threatened employees by informing them that Respondent did not want them to be employed by Respondent because they had testified against the Respondent. Huggins testified that approximately a week after the August trial, he had a conversation with Phelps as they were walking into work. Phelps asks Huggins how things went at the trial. Huggins replied, "Everything went okay". Huggins testified that Phelps made the statement that "he wished all this would go away and things would go back to normal". Huggins also recalled that Phelps added that Jim Scott hated the fact that he (Huggins) was out there because he testified for the Union. Phelps denied that he made any comments to Huggins about the August trial.

D. Complaint Paragraph 8

1. Huggins' complaints

General Counsel alleges that starting about August 30 and continuing until about September 30, Respondent failed to take action regarding harassment of pro-union employees.

Huggins was the only employee that General Counsel presented in support of this allegation.

Amperage knobs are the knobs or controls that regulate the amount of power used to melt the wire for the weld for both the "tig" and "mig" welding machines. On August 30, Huggins was working on a mig welding machine in the weld-out area in the back of the facility. After rolling carbon steel all morning, Huggins took a break. After he returned from break and resumed welding, he noticed that his mig tip melted away because of the machine's heat. He checked his welding machine and found that the amperage knob was at a level that was entirely too hot. He also noticed that the control that regulates the wire feed had also been increased. Huggins noticed that the argon gas that is used in the welding process had been turned off as well. Additionally Huggins discovered that the jack

[3] The transcription section that included Huggins' August 2002 testimony was received into evidence as General Counsel Exhibit No. 14 for the limited purpose of providing background to the charges in this current matter. I do not find Huggins' earlier testimony as specific evidence of Union activity, however his testimony constitutes notice of alleged Union activity for purposes of this matter.

stand that holds the pipe for the welding process had been lowered several inches. Huggins testified that when he reported this incident to Supervisor Harry Nelson, Nelson told him that he should check his rolling machine the next time before resuming work. Huggins did not recall whether Nelson said that he would talk with other employees and find out what happened. Huggins confirmed that Nelson was the only supervisor to whom he reported this incident.

Huggins worked on a tig machine on September 20. He described the tig machine as a welding process that uses tungsten to strike an arc on the pipe and to create an arc to melt wire. Huggins recalled that as he began welding, he noticed that what he thought to be the tungsten material uncharacteristically melting away. As it cooled, he examined it more closely and found that it was not tungsten at all, but rather a piece of stainless steel wire made to look like a one-eighth piece of tungsten. He explained that it appeared to be a wire cut to the length of tungsten with the ends ground with points as with tungsten. Huggins went to supervisor Harry Nelson and reported that someone deliberately put the stainless steel into his machine. Huggins recalls that Nelson suggested that someone was trying to play a joke on him and also suggested that he check his rolling machine again before going back to work. Huggins told Nelson that he didn't think that it was very funny when someone was sabotaging his machine.

Huggins testified that when he went out to his car after work on September 20, he discovered that his door was open and his windshield sun block was missing. He also noticed a balled-up roll of duct tape thrown on his floorboard. The next day he reported the condition of his car to Nelson. Nelson suggested that he needed to lock his car. Huggins explained to Nelson that his car was a 1962 New Yorker and the locks didn't work. Huggins testified that after that time, he brought a car to work with a functioning lock. Huggins did not recall whether Nelson told him that he would check with other employees and investigate the matter. Huggins confirmed that he did not report this incident to any other supervisor.

Huggins also testified that approximately a week before he was terminated, he was working in the front of the rolling tables. Ray Adams was the welder who was working nearest to him. As Huggins was welding, he received a blast of sparks from behind his head and the sparks entered his welding shield. Huggins noticed that the sparks were coming from the grinder in the welding booth used by Adams and employee Gerald Nelson. Huggins asked them to throw their sparks in a different direction. Huggins did not recall that Adams said anything to him, however he recalled that Adams stopped grinding. Approximately 20 minutes later, the sparks were thrown in his direction again. Huggins yelled at them and told them to turn their sparks in a different direction. Huggins did not recall if they responded to him in any way. When Huggins told Supervisor Nelson that they were throwing sparks on him and that Nelson needed to do something, he told Huggins that he would look into it. Ray Adams testified that there were a "couple of times" that Huggins complained that the sparks were burning him. Adams explained that when a welder is grinding a piece of pipe, the direction in which the sparks shoot from the grinder changes as the welder moves around the pipe. Adams explained that normally when sparks are sprayed into another welding booth, the person in the next booth will simply step out of the way for a few seconds because the sparks will continue to move on and change to a different direction. Adams recalls that he may have told Huggins to step out of the way, because that is normally what he tells someone if the sparks are falling on that person. Adams recalled that Huggins cursed him and accused him of burning him with the sparks. Adams denied that he intentionally threw the sparks on Huggins.

Supervisor Harry Nelson recalled that Huggins complained to him about the incidents involving the tungsten and the amperage knobs on his welding machine. Nelson testified that he went through the work area and asked other employees what they knew about these incidents. Nelson recalled that he went back to Huggins and told him that no one knew anything about these matters. Employee Gerald Nelson testified that supervisor Harry Nelson came to him and asked him if he had seen anyone in Huggins' work area or tampering with Huggins' equipment. Supervisor Nelson also recalled Huggins' complaints about his car. Nelson recalled that Huggins stated that if he caught anyone going in his car or messing with anything of his, he would "beat their fucking ass". Nelson testified that he also talked with the other employees about Huggins' complaints about the interference with his car. He went back to Huggins and told him that no one knew anything about what had happened to his car. When Huggins complained of the sparks in his welding area, Nelson went to Ray Adams. Nelson testified that while it was not unusual for sparks to fly in the shop area, he gave Adams a verbal warning.

2. Respondent's treatment of Huggins as compared to other employees

Harry Nelson testified that Respondent did not treat Huggins any differently than it did any other employee. Employee John David Frye testified that he had not observed any other employee accommodated as much as Huggins. Employee Ray Adams also testified that he did not know of any employee who had been accommodated as much as Huggins. Adams testified, "I think they've bent over backwards to accommodate him." Gerald Nelson worked as a welder for Respondent from March 2000 until December 2002. Nelson testified that he left his job with Respondent in 2002 because he was not getting enough hours.[4] Respondent's counsel asked Nelson if he had any reason to believe that Huggins was treated any differently than other employees. Nelson responded by stating that Huggins was treated better than anyone else. Nelson maintained that Respondent went above and beyond to help and to accommodate Huggins. Nelson also described Huggins as complaining about everything. In further response concerning Huggins' complaints, Nelson testified:

> He complained about sparks, that people, when they were grinding sparkswould come over and hit him; he complained

[4] Union Organizer Gregory Boggs testified that Nelson contacted him during the 2002 Christmas holiday and told him that Scott had terminated him. During the conversation, Nelson asked him to explain Judge Carson's decision that had issued in November in the former proceeding.

> about people were messingwith his machines and nobody ever messed with his machines- - I mean, I was right there beside him and I never seen anybody mess with his machines. I just really don't think he knew what he was doing. I mean, he just kept on and on and on, it just gets to a point you try to tune him out. He complained about everything.

Respondent's counsel asked if he remembered any other specific complaints and Nelson testified:

> He complained about the attendance policy; he complained about people who were harassing. I guess probably it's easier to say that he didn't complain about time to go home; that was about the only thing he didn't complain about.

Respondent presented evidence that upon Huggins' return from layoff in June, he complained about a number of working conditions in the plant. Upon his return from layoff, Huggins worked in the weld-out area in the back of the facility. Huggins confirmed that while working in that area, he complained about the fumes from the pickling vats. Human Resources and Safety Director John Goldberg testified that when Huggins complained of the fumes, Goldberg ordered respiratory protective equipment for Huggins' use. Upon receipt of the equipment, it was determined that Huggins would also need a special welding mask to fit with the respiratory equipment. Huggins acknowledged that Goldberg told him that he would try to get him another mask. Before Respondent received the equipment however, Huggins was moved to a different area of the plant to get him away from the fumes. Huggins testified that while working in this same area, he might have mentioned that it was hot, however he had not complained about being hot. Employee John Frye however, recalled that while working in weld-out, Huggins complained about not only the fumes but also the heat. Frye recalled that at one point, Huggins had as many as three fans for his use in weld-out. Scott testified that in addition to placing the fans near Huggins, Respondent also ordered Huggins an air vest, which is designed to provide additional cooling. Scott recalled that other than the complaints about the fumes and the heat, Huggins also complained about his weld-out machine and special modifications were then made to the machine.

Scott testified that Huggins initially worked in the portion of weld-out that was in the left rear of the back of the facility. Because of Huggins' complaints about the fumes and because it appeared that it might be sometime before Respondent received the additional respiratory equipment, Huggins was moved to the weld-out area on the right side of the back of the building and approximately 40 to 50 feet on the opposite side of the building. The new workstation was near a large door, estimated at 16 by 18 feet. Scott recalled that after moving Huggins to the new location, Huggins complained about wind coming through the door and about the foot traffic in the area. Huggins denied that he complained about the traffic in this location and he testified that he didn't recall complaining about the wind.

Scott testified that because of Huggins' continuing complaints in weld-out, he was moved to work at Table 3 in the front of the facility. Huggins admitted that the only reason that he was moved to a workstation at the front of the facility was to accommodate his complaint about the fumes. Huggins recalled that after he began working at the front of the facility there were occasions when a large amount of wind would come threw the doors that were near to his work area. The wind blew out the gas underneath his tig rig and affected his weld. Huggins testified that when this occurred, he simply walked over and closed the open door. He denies that he ever complained to anyone about this problem.

Huggins recalls that while working in the front of the facility, he complained about the worktables being too close. Huggins testified that because of the closeness of the tables, the sparks from Gerald Nelson and Ray Adams' work area were coming into his area. Huggins complained to Scott about this problem. Huggins testified that in response to his complaint, Scott told him that Ray Adams was a "scum-sucking asshole" for throwing sparks on him because he knew better than to do that. Scott told Huggins if it happened again to just get out of the way and Huggins testified that he did so.

Scott recalled that there had been an occasion when he was walking near Huggins' workstation and he heard sounds as though things were being thrown about. He testified that he walked up to the welding blind, looked inside, and asked Huggins what was wrong. Scott described Huggins as cursing and stating "Some S.O.B. stole my medicine." As Huggins explained that he had found his medicine missing when he returned from break, he also added "F'ing Steve Phelps" took his medicine. Scott recalled that he responded "Well, Robert, wait a minute. That's a heck of an accusation to make. Are you sure?" Huggins replied that he was sure. Scott testified that he had his two-radio with him and he told Huggins that he would get this matter straightened out and would call the authorities. At that point, Huggins told him to wait because he may have left the medicine at home. Scott testified that he told Huggins to check out his medicine that evening and if he still felt that Phelps had stolen his medicine, he should let Scott know the next morning.

Huggins testified that he kept Prevacid in his locker at work. He recalled that one day he discovered that it was missing. Huggins recalled that he told both Harry Nelson and Scott about his missing Prevacid. He told Scott that Phelps was the only person who knew that he kept it in his locker. Huggins recalled that later that same day, Scott came back to him and asked him if he would be willing to provide a written statement and to make a formal complaint as to what happened. Huggins admitted that he declined because he "didn't want to make a big deal" about it. Huggins acknowledged that Scott may have offered to call the police but he could not recall. He recalled however, that Scott told him to let him know if Huggins could not find the medicine. Admittedly, Huggins never reported back to Scott as to whether he found his medicine. He also recalled that he later told Scott that he needed to go to the doctor to have his prescription refilled.

E. Huggins' discipline for Work Performance

General Counsel alleges that Huggins received four warnings for his work performance between August 26 and September 18. The record reflects that three of these warnings were given to Huggins within a five-day period. Scott testified that at the

time of Huggins' discharge for violating the attendance policy, he was not in a progression discipline schedule for his work performance. Scott also explained that eventually the performance discipline would result in termination if the numbers continued to grow. He added however, that there were no particular number of disciplinary actions that would trigger a termination as each incident had to be weighed individually.

F. Respondent's Attendance Policy

Respondent's Human Resources and Safety Director John Goldberg testified that when Huggins returned from layoff, he and six other employees were given an orientation on June 3. During the orientation, Goldberg updated prior employment data and gave an overview of company employment and safety policies. Goldberg also recalled that he covered the new attendance policy that had been implemented in May in the June 3 orientation for Huggins and the other employees. Huggins admitted that the attendance policy may have been covered during his June orientation, however he testified that he didn't recall the "specifics on it". While Huggins asserts that he was not given anything in writing on the new policy, he admitted that the policy might have been posted on the Respondent's boards throughout the facility. Huggins testified that he never noticed nor read the policy. Former employee Gerald Nelson testified that Respondent posted memos concerning the new attendance policy in the break rooms and near the clock-out area. Nelson recalled that the memos remained posted from the time that the policy was implemented until at least December.

G. Application of Respondent's May 2002 Attendance Policy

On May 6, Respondent established a new attendance policy. Under the policy, all outstanding attendance violations were erased and all employees began with a clean slate. The policy provides for progressive discipline for its infractions and the progression includes a verbal warning, a written warning, a suspension, and ultimately discharge for any one of the four types of violations. The policy can be violated when an employee is absent, tardy, leaves early, or has a time card discrepancy that is not excused. The policy provides that four unexcused incidents of the same kind of violation occurring in any twelve (12)[5] month calendar period will result in discharge. The written policy states that each incident of excessive absenteeism or tardiness shall be evaluated on a case-by-case basis. Absences may be excused when the employee follows company call-in procedures and the employee returns to work with supporting documentation from a treating physician. Absences may also be excused when they are prescheduled for compelling reasons and with prior managerial approval. The policy further states that the company will require documentation of authorized reasons for absence where appropriate. Employees are further informed that while calling in does not excuse an unscheduled absence, it permits mitigating and extenuating circumstances to be weighed prior to imposing disciplinary action.

[5] The policy was later amended to cover only a 6-month period, giving employees a chance to begin with a new slate after the initial six-month period.

Initially, Respondent's President James Scott and Vice-President Kevin Scott reviewed compliance with the attendance policy daily. After Kevin Scott left the company, Goldberg assumed that responsibility. Goldberg testified that he collects the time card data the first thing each morning. If there is no basis to excuse the employee's absence or policy infraction, the employee receives the appropriate discipline. If there's an unexcused absence or unexcused infraction that requires disciplinary action, the disciplinary decision is made by James Scott and reviewed with the individual employee.

Scott testified that he implemented the new policy because his supervision let him down and failed to keep up with employee attendance, as they were required. Scott explained that he took the attendance policy away from his supervisors so that he could oversee it and get it back under control. When the new attendance policy was implemented on May 6, all employees were given a clean slate with respect to prior absences or infractions. Under the May 6 attendance policy, an employee was expected to turn in a request to their supervisor if they wanted to take off or if they knew in advance of their absence. Scott explained that even if the employee submits a request in advance, the request is not automatically granted. During the first six months of the new policy, employee Cindy Arledge was given the responsibility of obtaining follow-up information from the employees and securing the required documentation for the absence. If the employee provided a proper doctor's excuse to Arledge, the absence would be excused without involving Scott. In those situations in which Arledge had a question or if she felt the absence was not excusable, Arledge brought the matter to Scott for review.

H. Discipline administered to Huggins for attendance infractions that is not in dispute

The record reflects that Huggins received verbal and written warnings for infractions under the new attendance policy prior to his testifying in the August Board proceeding. On June 13, Huggins was given a verbal warning for leaving work early to go to the doctor and failing to provide the required supporting documentation. On June 25, Huggins was given a verbal warning when he called in sick and provided no doctor's statement in support of his absence. On July 2, Huggins was given a verbal warning for being tardy. He called in to report that he would be late because his son was "stuck in the couch". On July 17, Huggins was given a verbal warning because he did not clock in when he returned from lunch. On July 24, Huggins received a written warning for his second tardy. He received a written warning on August 2 when he again failed to clock in from lunch.

I. Huggins' Infractions of the attendance policy that were excused without discipline

On June 17, Huggins was excused for being late to work because he stated that he was not told that the hours had changed. His tardiness of June 27 was excused because of a time clock error. Huggins was excused for leaving work early on June 28 after injuring his back at work. Huggins' tardiness on July 1 was documented as excused because he had a note from Goldberg and Huggins provided documentation of a medical ap-

pointment. Huggins' absence on July 5 was excused because his supervisor and the production manager preauthorized his absence. Huggins was excused for leaving work early on July 19 when his wife brought in parts to document that his vehicle had broken down in the parking lot. Huggins was also excused for his tardiness on August 14 when he provided documentation of his car repair. Huggins was again excused when he left work early on August 30. Respondent's records reflect that the Florida Highway Patrol called Respondent to confirm that Huggins' wife had car trouble on the Hathaway Bridge and Huggins was needed to move the vehicle. During cross examination, Huggins admitted that he stated in his affidavit to the Board on August 30 that he had called his wife during lunch on August 30 and he asked her to call him at work and report that she had an emergency. He admitted that he had done so because he wanted to leave work early to talk with Union Representative Boggs. Despite his admitted testimony in the affidavit, Huggins denied that he told Respondent that his wife's car had broken down in order to leave early.

J. Discipline administered to Huggins after his August testimony

1. The September 4 warning and suspension

Huggins was given a three-day suspension on September 4 for his September 3 absence and his failure to provide a doctor's statement. On direct examination, Huggins testified that he had been absent on September 3 because he went to the doctor to get a prescription filled. He maintained that prior to his absence he told Scott that he had to go to the doctor to get his prescription filled. While the record is not clear on this point, it appears that the medicine in question was the same medicine that Huggins had earlier accused Supervisor Phelps of removing form his work area. He denied that while he was never asked for a receipt for the medicine, he told Scott and Nelson that the medicine costs $150. He initially denied having any conversation with Cindy Arledge about this absence.

Arledge testified that the job that Scott gave her in enforcing the attendance policy was "not one that a lot of employees would probably take." She explained that she often received a good deal of ridicule from other employees and she was referred to as the "police" or the "narc". She believed that Huggins saw her as the 'enemy" when she attempted to get documentation for his absence. She recalled that when she first asked Huggins for his paperwork for this absence, he had been very arrogant and rude and demanded to know why he had to give it to her. The following day she again asked Huggins for the paperwork and he responded to her in the same manner. At that point, she went to Huggins' supervisor, Harry Nelson, and asked him to accompany her to talk with Huggins. In Arledge's presence, Nelson explained why Arledge needed the documentation and Huggins acknowledged that he didn't have the documentation. Arledge testified that at that point, she had no alternative but to take the matter to Scott.

Arledge testified that she was present when Scott spoke with Huggins about the absence. During the meeting, Huggins admitted that he had no doctor's statement because he had only refilled his prescription. During General Counsel's case in rebuttal, Huggins testified that he went to the doctor to get his prescription filled for the Prevacid medication and then he went to the pharmacy to have the prescription filled. Huggins did not deny that he failed to provide any documentation for the absence. Although he initially denied having any conversation with Arledge during Counsel for General Counsel's direct examination, Huggins testified on rebuttal that he recalled the conversation with Arledge. Huggins maintained that when Arledge first asked him for documentation for his absence, he had not known who she was and he didn't think that it was any of her business. He further confirmed that Arledge came back to him later in the day accompanied by Nelson. Huggins recalled that he told Arledge and Nelson that because he had filled out paperwork in advance of getting his prescription filled, he didn't need a doctor's excuse. Huggins admitted however, that Arledge told him that she still needed a doctor's excuse for his absence. Huggins recalled that he told Arledge that the only way he could provide a doctor's excuse was for him to leave work and go to get one. Huggins recalled that same day he was called into the office to talk with Scott with Arledge present. Huggins testified that while in the office, he apologized to Arledge for his remarks to her. When testifying Huggins denied any admission to Scott that he had not gone to the doctor.

2. Huggins September 13 written warning

Respondent issued a written warning to Huggins on September 13 for his second unexcused incident of leaving work early. The notice of warning documents that Huggins left work at 1:55 p.m. because his wife was out of gas. Huggins presented a gas ticket showing the purchase of gas at 3:43 p.m. While Huggins signed the warning, he noted on the bottom that he did not agree with the discipline. Huggins testified that his wife called him on September 12 and reported that she ran out of gas while she was picking up their children from school. Huggins told Nelson that he had to leave in order to get his wife before the school closed the gates. Huggins asked Nelson if he needed to bring a receipt and Nelson told him that he did. Although Huggins returned with the receipt the next day, he was called into Scott's office and given a written warning. Scott showed Huggins his attendance record and told him that his next absence or incidence of leaving early would result in further discipline.

Arledge testified that her job involved bringing absences to Scott's attention. Scott testified that if an employee had a proper excuse and Arledge had no questions, the absence would be processed without further attention. In those situations where Arledge had questions or thought that the absence was inexcusable, she brought the matter to Scott. Arledge recalled that when Huggins presented his gas receipt in support of his leaving early on September 12, there had already been one or two times previously when Huggins left work for this same reason. Arledge testified that this was the second or third time that Huggins tried to get excused for the same reason and she brought it to Scott's attention because she didn't think that it was right. Arledge was present with Scott when he spoke with Huggins about this absence. Arledge recalled Scott's telling Huggins that it didn't matter that he had a receipt because he had work that had to be finished. Scott explained that he

needed Huggins there and he couldn't have him leaving every day. Arledge recalled Scott's saying, "If every one of my employees left every day to take their wife gas, how many of us would be employed?"

3. Huggins' termination

Huggins' notice of termination reflects that he called the front desk on September 27 and reported that he was going to be absent because of car problems. The termination notice documents that Huggins was terminated because he had no repair bill for documentation. Huggins testified that he missed work on September 27 because he had to take his car in for repair. When Huggins returned to work on September 30, Nelson asked for an excuse to cover his absence. Huggins responded that he did not have any documentation because his car was not ready for return. Huggins admitted at the hearing that after receiving the previous suspension, he understood that he could be terminated for his next absence.

Scott not only denies that Respondent treated Huggins more harshly than other employees, but he testified that Respondent treated Huggins more leniently under the attendance policy than other employees. He explained that he was aware that Huggins was taking daily notes. Because Scott felt that Huggins was looking for a reason to do something to Respondent, he tried to be careful and give Huggins the benefit of the doubt.

K. General Counsel's Evidence of Animus

On January 30, Scott sent a letter to Eric Johnson, a welding instructor at the Bay County Florida Vocational School. In the letter, Scott accused the instructor of providing no assistance to him or students employed by Respondent because Respondent was a non-union shop. Scott further stated:

> You misunderstood why I would not contact the School Board members, Guidance Counselors, etc. on your behalf. The reason I would not contact any of the people mentioned above or sit on your advisory board was that I did not want to be a part of your unionizing effort. At one time, you even had a union representative on this committee. You told me in my own shop how good my shop *could have been* had it been union. That was the last conversation you and I have had and the last time I donated material for your students.

General Counsel also presented additional evidence of animus through the testimony of Huggins. Huggins recalled that on the same day that he noticed that his jack stand had been altered during his break, he took a water break near his workstation. Huggins explained that the water source is located in the middle of the shop area near where his supervisor "normally hangs out." As he was drinking water, he observed Steve Phelps talking with Ray Adams. Phelps looked toward Huggins and stated "This man right here might be running the shop one day and there will be a shop steward at every station." At the time of his comment Phelps was approximately 7 feet away from Huggins and looking in Huggins' direction. Huggins testified that Adams laughed and appeared to view Phelps' comment as a joke. After making this statement, Phelps left the area and Huggins went back to work. Phelps testified that he did not recall the conversation with Adams or any similar conversation. Although Ray Adams testified concerning other matters, he did not corroborate Phelps' denial of the conversation.

Huggins also recalled another comment made by Phelps on a different occasion, however he could not recall the exact date. Huggins estimated that the comment might have occurred the day after Phelps talked with him about his testifying in the Board proceeding. Huggins was in the break room when Phelps "burst through the door." Huggins recalled that in a loud voice, Phelps made the comment that no one respected his authority and that he ought to get Huggins to lie for him. Huggins estimated that Phelps was approximately five or six feet away from him when he made the remark. Huggins provided no additional testimony as to whether he said anything in response to Phelps or what occurred after the comment was made.

Huggins testified that approximately three days after his suspension, he was welding a piece of pipe in the weld-out area. He was using two jack stands to weld because the weld-out machine was broken. When Harry Nelson and Scott walked by his work area, Scott asked why he was not using the rollout machine. Huggins explained that the machine was broken and if they wanted him to use it, it would have to be repaired. Huggins recalled Scott's stating that it was asinine that he was not using this welding machine. Scott then mentioned that he had heard Huggins testify in the Board hearing that the rollout machine slowed the process in the rolling shop. Huggins recalls that he told Scott that was a lie and he denied that had been his testimony in the hearing. Huggins explained that he then clarified for Scott his testimony concerning the welding steps that slowed the process. Huggins testified that he then told Scott that he had nothing further to say to him about the trial and he walked away.

II. ANALYSIS AND CONCLUSIONS

A. Alleged 8(a)(1) Violations

The record evidence contains no independent allegations of 8(a)(1) conduct other than the alleged threat by Phelps to Huggins. General Counsel alleges that Phelps told Huggins that he "wished that all this would go away and things would go back to normal." Phelps went on to add that Scott hated the fact that Huggins was "out there" because he testified for the Union. Phelps denies this conversation with Huggins. While I do not find Huggins to be an especially credible witness, I find Phelps less credible. The overall record supports a finding that Phelps made comments directed toward Huggins' activity in support of the Union as well as his testifying in the Board trial. I credit Huggins' testimony that Phelps' joked about Huggins' running the shop and having Union stewards at every workstation. I find Huggins' credible in light of the fact that Adams did not corroborate Phelps' denial of the conversation. While Phelps denies the alleged comment about getting Huggins to lie for him, I don't find his denial credible. Based upon Phelps' other comments to Huggins, the record supports a conclusion that he also told Huggins during this same time frame that Scott hated his being "out there" because he had testified for the Union. I note however, that in making this comment to Huggins, Phelps made no threat of reprisal or prediction as to the consequences of Huggins having done so. Accordingly, I find no evidence of

a threat that would constitute a violation of Section 8(a)(1) of the Act.

The Board has previously found that while an employer's expression of its views or opinions against a union without an explicit threat of reprisal cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. *Tejas Electrical Services*, 338 NLRB No. 39, fn. 5 (2002*). Mediplex of Stamford*, 334 NLRB 903, slip op. at 1(2001). Crediting Huggins' testimony, I find Phelps' comment as evidence of animus toward Huggins for his having testified for the Union.

B. Whether Respondent failed to take action regarding harassment of Huggins

Huggins testified concerning a number of incidents alleged to have occurred during the month after he testified at the Board trial. Huggins testified concerning specific incidents occurring on August 30, September 20, and a date estimated as approximately a week before his termination. General Counsel alleges that Respondent failed to take any action concerning Huggins' complaints. Huggins contends that on August 30 he found his welding machine's amperage knob turned higher and the jack stand, which held the pipe to be welded, lowered. He also noticed that the argon gas that he used in the welding process was turned off. Huggins reported these incidents only to his immediate supervisor, Harry Nelson. He could not recall whether Nelson told him that he would talk with other employees to find out what happened. Huggins also testified that he told Nelson about the substitution of the stainless steel wire for tungsten and the disappearance of his car's sunscreen on September 20. Huggins acknowledged that he only spoke with Nelson about these incidents and he could not recall whether Nelson told him that he would speak with other employees and investigate the matter. Huggins did recall that Nelson suggested that someone might have been playing a joke on him with the exchange of the stainless steel for the tungsten. Huggins recalled that when he reported to Nelson that employees Ray Adams and Gerald Nelson had been throwing sparks into his area, Nelson told him that he would look into it. Huggins also recalled that when he complained to Scott about Adams' throwing sparks on him, Scott made disparaging remarks about Adams.

Supervisor Harry Nelson testified that after Huggins reported the changes to his welding machine, the substitution of the steel for the tungsten, and the tampering of his car, he went through the work area and asked employees what they knew about these incidents. In response to Huggins' complaints about Adams' throwing sparks, he talked with Adams and ultimately gave Adams a verbal warning. I found Nelson to be a credible witness. His testimony was further bolstered by the testimony of former employee Gerald Nelson. The record contains no evidence of any familial relationship between Supervisor Harry Nelson and employee Gerald Nelson. Gerald Nelson recalled Harry Nelson's having asked him if he had seen anyone in Huggins' area or if he knew anything about anyone tampering with Huggins' equipment. Crediting both Harry Nelson and Gerald Nelson, the record evidence is insufficient to show that Respondent failed to take action regarding harassment of Huggins or any other pro-union employees.

On the contrary, the record demonstrates that Respondent was especially responsive to Huggins' complaints. As discussed above, Scott, other supervisors, and employees provided extensive testimony about Huggins' complaints and Respondent's attempts to accommodate Huggins. The most credible evidence of Huggins' penchant for complaints and Respondent's attempts to respond came through the testimony of former employee Gerald Nelson. At the time of his testimony, Nelson had been out of the Respondent's employ for approximately four months. The record contains no basis for any loyalty or vested interest beyond that of any other former employee.[6] The overall tenor of Nelson's testimony was his observation of Huggins' repeated complaints about his working environment. Employees Nelson, Adams, and Frye all confirmed that Respondent accommodated no other employees as much as Huggins. The record is without dispute that in response to Huggins' complaints, Respondent ordered special respiratory equipment for him, provided him with a cooling vest, and relocated his working area at least twice. Scott acknowledged that Respondent tried to accommodate Huggins with his various complaints because of his having testified against the company in court. Scott maintained that while Respondent was very careful about what action it took with respect to Huggins; nothing was sufficient to pacify Huggins. Accordingly, I don't find that Respondent was unresponsive to Huggins' complaints as alleged in the complaint. As Counsel for Respondent points out in their brief, Huggins' admissions belie the assertion that Respondent did not investigate Huggins' complaints about his acid reflux medication. Admittedly, after Huggins alleged that Phelps took his acid reflux medicine, Scott offered to contact the police and to confront Phelps with this matter. Rather than letting Scott pursue either of these actions, Huggins stated that he might have left the medicine at home. Huggins also admitted that Scott approached him later and gave him the opportunity to file a written complaint and Huggins declined. Counsel argues that by Huggins' own admissions, Scott offered to confront the accused, to call the police, and to take a formal written complaint from Huggins. Huggins declined all offers. I further note that this incident is the only incident in which Huggins identified to Respondent the identity of the individual who might have been responsible for the alleged harassment. There is no evidence that Respondent's managers or supervisors had any knowledge of the individual or individuals responsible for any of the other incidents of alleged harassment.

Accordingly, I do not find that Respondent was unresponsive to Huggins' complaints nor do I find that there is evidence that

[6] Although Union Representative Boggs testified that Nelson talked with him in December about Scott firing him, Nelson denied any conversations with Boggs. While I find Boggs to be a credible witness, the record contains no evidence of Nelson' having a vested or personal interest that would discredit his testimony concerning Huggins' alleged complaints.

Respondent condoned or acquiesced[7] in any alleged harassment to Huggins.

C. Huggins' Discipline

From August 26 to September 30, Respondent issued four work performance warnings to Huggins. Pursuant to the attendance policy, Huggins received a verbal warning, a written warning, a suspension and ultimately a termination on September 30. General Counsel alleges that Respondent took this action toward Huggins because of Huggins' union activity and because he testified in the August Board proceeding.

1. Discipline for Work Performance

Huggins received three warnings for work performance related to his welding between August 26 and August 30. He received a fourth warning for leaving a piece of foam rubber or a "purge dam" in a pipe on September 18.

Scott testified that prior to his being hired, Huggins took a pre-employment welding test, which was the very basic carbon steel, schedule 40 six-inch test where two heliarc passes are run through the pipe. During the test, Huggins had difficulty with the "root pass" or bottom portion of the weld. Huggins described the root pass as the first pass when two pieces of pipe are welded together. Despite the fact that Huggins did not pass the test, he was hired in January. By August 26, Respondent moved Huggins to table three performing root welds on stainless steel pipe. The warnings given to Huggins on August 26, 28 and 30 were either for excessive root pass penetration or for lack of root pass penetration in his welds. Scott testified that while all welders have to occasionally grind a little spot here or there, Huggins had to grind all 360 degrees of every root pass that he was welding. Scott admitted however, that the time period in which Huggins had difficulty with the root passes was the three to five day period when he was assigned to a fit-up welding table to work with a fitter. Prior to that time, Huggins worked by himself in weld-out. Scott also admitted that the three warnings given to Huggins in August were the only discipline that Huggins ever received for welding problems.[8]

Huggins testified that when he worked in weld-out, he repaired other employee's welds for the same errors for which he was given a warning. He estimated that he observed these same errors as often as twice a week. General Counsel submitted records to show that between September 10 and November 21, Ray Adams was cited for six work errors, yet issued no disciplinary warning. Employee Scott Parsons was cited for five work errors between November 19 and December 12 and yet received no discipline. When Parsons was laid off, his supervisor indicated that not only would Respondent rehire Parsons but also that he would be strongly recommended to any company. While employee Alanza Russ is credited with five work errors between June 20, 2001 and December 14, 2001, there is no evidence that he was disciplined for these errors.

Huggins testified that a piece of foam rubber or a purge dam blocks the end of the pipe when argon gas is purged into the pipe to get rid of all of the oxygen. The process is used to insure a clean atmosphere for welding. Welders and the fitters are responsible for removing the foam rubber at the completion of their work process. On September 18, Harry Nelson asked Huggins to accompany him to the next building to talk with Quality Control Foreman Ken Beard. When Huggins and Nelson met Beard, he showed them a four-inch stainless steel pipe lying on the ground containing a piece of foam rubber in the end of the pipe. Nelson questioned Beard as to why they had been called over to see the pipe and why Beard had not simply removed the foam from the pipe. At that point, Huggins saw Scott walking toward them. Huggins recalls that Beard pointed to Scott and responded to Nelson, "You need to talk to that man right there."

Scott acknowledged that "it takes absolutely no effort to reach in and pull out" the purge dam from a pipe. He went on to testify however, that as long as the purge dam remains in the pipe, "it is a potential major catastrophe" and it is the responsibility of welders and fitters to remove it. He stated that if left in the pipe, the purge dam could cause extensive damage and expense to their customers. When Respondent laid off employee Timothy Speakman in January 2003, Respondent indicated a willingness to rehire Speakman in his employee termination review. Counsel for the General Counsel submitted records to show that Speakman made errors that generated costs to Respondent on November 19, 20 and 30, 2002.[9] These mistakes came after Speakman had already received a three-day suspension for the quality of his work on October 7, 2002. The suspension was given after Speakman's August 28 work error and two other work errors on September 30 that resulted in estimated costs to the Respondent totaling approximately $4500. Speakman was given a written warning for a mistake on May 22. The warning documented that the next incident would result in a three-day suspension.[10] Despite the warning however, Speakman was documented with work errors on May 30, June 28, and August 1, which were estimated to result in approximate costs of $1600. Rather than a suspension however, Speakman was given a written warning on August 13 for an unacceptable root weld. The record reflects that Speakman alone was attributed with 14 documented performance errors between May 14 and November 30 at an estimated cost of over $7300. Despite the fact that he received a written warning and a suspension, Respondent indicated a willingness to rehire him when he was laid off in January 2003.

Based upon the record evidence as a whole, I am unpersuaded that Respondent's performance warnings to Huggins were coincidental or unrelated to his Union or protected activity. There is no evidence that Huggins received any discipline for work performance prior to his testifying in the Board pro-

[7] *Giovanni's*, 259 NLRB 233 (1981).

[8] While employee Nelson evaluated Huggins' welding ability at a level of 2, employee Adams estimated that Huggins' ability was at a 5 to 5 and a half on a 10 point scale. Employee Frye testified however, that Huggins was a "fair" welder and that he did a 'pretty good job".

[9] The total estimated costs for the three incidents totaled approximately $150.

[10] The record reflects documentation of errors attributed to Speakman for May 14 and May 22; estimated at an approximate cost of more than $1100.

ceeding. Respondent knew that Huggins did not perform well with root welds as Huggins specifically failed the portion of the welding test related to root welds. With that knowledge, Respondent transferred Huggins to the fit-up table for a period of three to five days where he was given three warnings. In his brief, Counsel for the General Counsel argues that Respondent was setting up Huggins for failure. General Counsel's argument has merit. It is also noted that these three warning were given to Huggins during the five day period following his testifying at the Board proceeding. These warnings were also given within a 10-day period prior to Phelps' conversation with Huggins about his testifying for the Union.

Although Scott testified at great length about the potential expense that could result from an employee's inadvertently leaving a purge dam in a pipe, Respondent has documented only one instance when Huggins may have been responsible for such an omission. In contrast to this one incident, Respondent tolerated continued errors from Timothy Speakman at an estimated cost of over $7300 and yet his performance did not affect his eligibility for recall. Scott testified that there is no formal progressive discipline system in place for work performance. He acknowledged however, that while there is no established number of incidents that triggers an automatic step in progressive discipline, an employee would be terminated "if they just kept growing."

In *Wright Line*, 251 NLRB 1083 (1980), enfd. F. 2d 899 (1st. Cir. 1981), cert denied 455 U.S. 989 (1982), the Board set out its causation test for cases alleging violations of the Act based upon the employer's motivation. The General Counsel is charged with the responsibility of making a prima facie showing sufficient to support the inference that the employee's protected conduct was a "motivating factor" in the employer's decision. It is only if General Counsel has made such a showing that the burden shifts to the respondent employer to demonstrate that it would have taken the same action in the absence of the employee's protected conduct.

A prima facie case is made out where the General Counsel establishes union or protected activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging union activity.[11] Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence.[12] I find that General Counsel has established the requisite prima facie case as required by the Board in Wright Line. There is no dispute that Huggins engaged in protected activity when he testified on behalf of the Union in the August Board proceeding. Within three days of his testimony, Respondent issued three disciplinary warnings to him for work performance and followed with a fourth warning for work performance nineteen days later. While Respondent states that there is no specific number of work performance warnings that will trigger further disciplinary action, Scott acknowledges that Respondent will terminate an employee if the alleged work deficiencies continue to grow. Within three weeks of giving testimony, Respondent issued four warnings to Huggins for his work performance. It is apparent that the stage was set for further disciplinary action based solely upon his work performance. Thus, the record clearly demonstrates that Respondent took adverse action against Huggins immediately upon learning of Huggins' protected activity. The requisite animus required for the Wright Line analysis is established through Phelps' statements to Huggins following his testimony. The credited evidence establishes that in the days following Huggins' testimony, Phelps referenced Huggins' testimony and his union activity on at least three separate occasions. He not only accused Huggins of lying in his testimony, but he told Huggins how Scott felt about him because of his testifying for the Union. He also jokingly accused Huggins of wanting to become chief steward for the Union. The Board has found conduct that exhibits animus but that is not found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful. See *Meritor Automotive, Inc*., 328 NLRB 813 (1999). While I have found no specific threat or 8(a)(1) violation in Phelps' statements, I find that such remarks amply demonstrate animus toward Huggins.

Crediting Scott's testimony in part, it is likely that Huggins demonstrated poor quality in the root passes on August 26, 28, and 30, inasmuch as he failed his pre-employment welding test because of this deficiency. Respondent was well aware of this deficiency when it re-assigned Huggins to this work process. The record does not reflect the date of Huggins' reassignment, however Scott testified that he only worked on this particular job for three to five days. Thus, it is apparent that Huggins' assignment to a job for which he was not qualified occurred on or about the time of his Board testimony. The Board has found that suspicious timing may support an inference of animus and discriminatory motive. Respondent contends that Huggins was moved to the front of the facility as a part of its total attempt to accommodate his complaints about the fumes. While this may be true in part, the record supports a finding of discriminatory motive as well. While the record reflects that Respondent has issued work performance discipline to other employees, I do not find that such conduct sufficient to meet Respondent's burden under Wright Line. Huggins had never received discipline for his work performance prior to his testifying in the Board proceeding. Huggins was transferred to an area where he would be expected to have performance difficulty on or about the time of his protected activity. Almost immediately, Respondent issued three successive warnings for defective root passes. I find the total circumstances to warrant an inference that Respondent's true motive in issuing work performance discipline to Huggins was his protected activity. Additionally, Respondent argues that the work performance warning issued to Huggins on September 18 was necessary because of the potential expense that could have resulted in the purge dam that was left in the pipe. The record evidence however, reflects that Respondent has shown tolerance to other employees whose work performance has resulted in significant expense to Respondent. Respondent's records reflect that it would rehire employee Speakman despite his continued work errors that

[11] *Farmer Bros., Co*., 303 NLRB 638, 649 (1991), enfd. 988 F. 2d. 120 (9th Cir. 1993).

[12] *Tubular Corp.*, 337 NLRB 99 (2001).

were estimated to cost as much as $7300 over a period of six months. The circumstances of the September 18 warning support a finding of discriminatory intent. In his brief, Counsel for the General Counsel points out that Huggins was not simply informed that he had left the foam rubber from the pipe. He and his supervisor were instead, taken from his work area to another building, for Huggins to physically view the pipe with the offending foam rubber. I credit Huggins' testimony that his supervisor Harry Nelson was incredulous that Quality Control supervisor, Ken Beard, interrupted Huggins' work to show him the foam rubber in the pipe. Based upon Huggins' credited testimony, Beard quickly explained that this action had been at the direction of Scott. The overall record suggests that Respondent seized the opportunity to add yet one more work performance warning to Huggins' record less than a month after Huggins testified for the Union. The Board has noted that because there is seldom direct evidence of unlawful motivation, circumstantial evidence may be relied upon to draw an inference of discriminatory motive. See *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d. Cir. 1988). In this case, the overall circumstances and timing of Huggins' warnings for work performance supports a finding of discriminatory motive. In its brief, Respondent argues that the timing of Huggins' work performance discipline is not connected to any aspect of Huggins' union activity. Respondent argues that Huggins was needed to work at the table because of other employee absences. I note however, that while Respondent made this assertion at trial and in its brief, no evidence was submitted in support of the "unforeseen circumstances" that Respondent alleges. Finding Respondent's stated reasons for issuing the work performance warnings to Huggins as pretextual, I also find that the surrounding facts tend to reinforce an inference of unlawful motivation.[13] Accordingly, I don't find that Respondent has sufficiently demonstrated that it would have issued work performance warnings to Huggins on August 26, 28, 30 and September 18, even without his protected activity and I find these warnings to be violative of Section 8(a)(3) of the Act.

2. Huggins' discipline for attendance policy infractions

After Huggins testified at the August Board proceeding, he received a suspension on September 4 and a written warning on September 13 before his termination on September 30. I find that with respect to the discipline imposed on these dates, General Counsel has established a prima facie 8(a)(3) case under *Wright Line*, 252 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); Naomi Knitting *Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The initial three elements of the Wright Line analysis are clearly met. It is without dispute that Huggins engaged in protected activity, his activity was known to Respondent, and he received adverse employment action. The fourth factor in the analysis is the requisite link or nexus between the protected activity and the adverse employment action. *Hays Corp*., 334 NLRB 48 (2001). As discussed above in relation to the work performance discipline issued to Huggins, Respondent demonstrated animus toward the Union and specifically toward Huggins for his support of the Union. The credited testimony reflecting animus toward Huggins includes statements made to Huggins within the weeks following his testimony on behalf of the Union. I find that the overall evidence of animus sufficient to establish the requisite link between Huggins' protected activity and the discipline administered to Huggins under the attendance policy.

Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Hicks Oil & Gas*, 293 NLRB 84, 85 (1989), enfd. 942 F. 2d 1140 (7th Cir. 1991). This burden is met with respect to the discipline imposed on September 4, September 13 as well as with Huggins' September 30 termination. Respondent has sufficiently demonstrated a legitimate reason for Huggins' discipline and has shown by a preponderance of the evidence that it would have taken the same action even without an illegal motive.

While Huggins testified that he did not notice nor read the attendance policy that was implemented in May, he acknowledged that Goldberg "might" have covered the policy with him during his June 3 orientation. Huggins also admitted that the policy "might" have been posted on the bulletin boards throughout the facility. I credit the testimony of Gerald Nelson, who testified without contradiction, that the policy was posted near the break rooms and the time clock until at least December. Whether or not Huggins chose to read the attendance policy, he was given sufficient opportunity to familiarize himself with the policy. The policy states that Respondent will require documentation of authorized reasons for absence where appropriate. The last paragraph of the policy provides that if management has reason to suspect abuse in the case of absenteeism, the employee will be required to present satisfactory proof of the need for the employee's absence. The record demonstrates that prior to testifying at the Board proceeding, Huggins received a verbal warning on June 13 when he left work early to go to the doctor and failed to provide the required documentation. On June 25, he was again given a verbal warning when he called in sick and yet never provided a doctor's statement in support of his absence. The record further reflects that his tardiness on August 14 and his leaving work early on July 19 were both excused because Huggins provided either documentation or supporting information. Thus, the record is undisputed that prior to his protected activity, Huggins was disciplined for attendance infractions when he failed to provide documentation and he was excused for other potential infractions when he provided documentation.

The record evidence involving Huggins' September 4 warning is perhaps the most significant in analyzing Huggins' credibility as well as establishing the foundation of Respondent's affirmative defense. Primarily, it is the credible testimony of Cindy Arledge that is most compelling. Arledge credibly testified that she was the employee responsible for securing the documentation from employees to determine whether their

[13] *Shattuck Denn Mining Corp. (Iron King Branch)*, 362 F. 2d 466 (9th Cir., 1966)

absences were excused or unexcused under the May attendance policy. She testified that she was aware that she was sometimes viewed as the attendance policy police. Her testimony indicated that because she took great pride in her responsibility, she tried to consistently and conscientiously enforce the policy. Her testimony was visibly emotive as she described her attempts to talk with Huggins and to convince him that she needed a doctor's statement to document his absence on September 3. In contrast to Huggins[14], Arledge's testimony was consistent throughout direct and cross-examination. Although Huggins initially denied having any conversation with Arledge during direct examination, he later testified on rebuttal with great detail about three separate conversations with Arledge concerning his lack of documentation. He even contended on rebuttal that he apologized to her when he had was called into Scott's office to discuss his lack of documentation. Arledge testified that when Huggins met with Scott, he admitted that he only filled his prescription and had not actually seen a doctor. While Huggins denied this admission to Scott, he does not dispute that he failed to provide any documentation for this absence.

Huggins left work at 1:55 p.m. on September 12 because his wife was allegedly out of gas. Although Huggins produced a gas receipt showing the purchase of gas at 3:43 p.m., Arledge testified that Huggins had used this same excuse once or twice before. Arledge brought this matter to Scott's attention because she questioned whether this absence should be excused. Huggins' own testimony reflects that Arledge may have had a legitimate basis for questioning Huggins and his wife's repeated emergencies. He admitted that on August 30, he arranged for his wife to call him at work and report that she had an emergency in order that he could leave work early. While the record does not reflect that Arledge was aware of Huggins' fabrication on August 30, his admission lends credence to her suspicions.

Huggins does not deny that he did not report to work on August 27 as scheduled. While he told Respondent that he did so because he was having his car repaired, he reported to work on August 30 without any documentation of this repair. Huggins testified that he told Respondent that he could not provide documentation because he had not received his car from the repair shop. Huggins admitted that after receiving the earlier suspension, he was aware that he could be terminated for his next unexcused absence. Based upon his previous excused and unexcused absences, Huggins should have been fully aware of the necessity for documentation. Although he may not have had a final repair bill to submit, he apparently made no attempt to obtain any kind of documentation from the repair shop. The record does not reflect that he made any offer to get in touch with the repair shop or to provide anything in support of his absence on August 27.[15]

The record contains evidence of Respondent's animus toward the Union and specifically toward Huggins. While I have no doubt that Respondent was pleased that Huggins could be terminated under the attendance policy, the record supports that he would have been terminated in the absence of his protected activity. Based upon Respondent's past practice, Huggins was well aware of the significance of providing documentation in support of unscheduled absences. Huggins testified that on 5 to 10 occasions, Respondent previously excused his absences after he submitted documentation and he does not deny that he was told that he was required to submit documentation. Despite this knowledge however, Huggins made no attempt to provide documentation of his absence on September 27. I do not find that Respondent treated Huggins any differently than any other employee under the attendance policy. If anything, Respondent may have been more lenient with Huggins than other employees. In testifying about Respondent's treatment of Huggins, Scott recalled:

There was just one incident right after the other with Robert complaining, and like I said, we bent over backwards trying to -- I constantly kept in mind that Robert had testified against us and I felt that the opposing party would jump at an opportunity should I fire him for any reason, legitimate or not, that they would jump on an opportunity to take me back in court to get me to spend more money. And so for them to take us back into court that they would jump on the opportunity, so we was very, very careful about what we did with Mr. Huggins and trying to pacify him, but nothing we done could pacify Mr. Huggins.

By the time that Huggins testified in the Board proceeding on August 26, he had already received four verbal warnings under the attendance policy for leaving early, tardiness, failing to clock out and for an unexcused absence. Huggins received a verbal warning on June 13 when left work early to go to the doctor, but provided no documentation in support of the absence. On June 25, he called in sick but failed to provide a doctor's note. On July 2, he was given a verbal warning for tardiness and July 17, he received a verbal warning for failing to clock in after lunch. Respondent submitted records to show that from the time that the attendance policy was implemented in May and prior to October 28, Respondent issued 105 verbal warnings to other employees for infractions relating to absences, tardiness, leaving early or failure to clock in or out.

[14] Huggins' admitted that while he stated in his June 3 Medical Questionnaire form that he had never received worker's compensation for work related injuries, he had in fact done so before working for Respondent. Huggins asserted that he completed the form incorrectly because he misread the form. While Respondent took no action against Huggins once it was discovered that he had falsified this pre-employment form, his admissions nonetheless indicate his possible predilection toward self-serving statements in lieu of total candor. While I have credited Huggins with respect to comments made to him by both Scott and Phelps, I nevertheless find that Huggins was less than candid in his testimony describing the circumstances of his discipline.

[15] Gerald Nelson testified that at the end of August or the first of September, Huggins told him that he (Huggins) was going to make Jim Scott fire him and then file suit against him. Huggins suggested that he knew that Scott didn't like the Union. He predicted that the suit would be successful, as it would ride on the coattails of the other allegations against Respondent. It is likely that Nelson may have sought to present Huggins in the worst possible light because of his apparent disdain for Huggins. I note however, that while Huggins testified at least twice after Nelson, he did not deny Nelson's testimony concerning this alleged statement to Nelson. In crediting Nelson's testimony, the question certainly arises as to whether there were any other reasons that Huggins may not have been diligent in complying with the basic requirements of the attendance policy.

Respondent's records also reflect that prior to testifying in the Board proceeding on August 26, Huggins had already received three written warnings. He received a warning on July 8 after he was absent from work for reported car trouble. He received a warning on July 24 for tardiness and again on August 2 for failing to clock in after returning from lunch. Respondent's records also reflect that between May 9 and November 4, Respondent issued 53 written warnings to other employees for various attendance policy violations. On September 12, Huggins received the written warning for leaving work early because he reported that his wife was out of gas. Although Huggins submitted a gas ticket for the purchase of gas later that same day, his absence was unexcused. I credit the testimony of Cindy Arledge who testified that because she felt that Huggins' absences to attend to his wife's emergencies were excessive; she brought the matter to the attention of Scott. I note that employee F. Mask received a written warning on June 25 for an absence. The warning states that she requested permission to take off from work to take her husband for a doctor's appointment. Because such appointments were found to be excessive and because the employee was noted to take all day for such doctor's appointments, the absence was unexcused and she was issued the warning. Thus, it appears that regardless of documentation, Respondent has issued warnings to other employees when there was suspected abuse or excessive absences.

Huggins received a three-day suspension on September 4 for his absence on September 3 and his failure to provide a doctor's statement. Respondent's records reflect that between May 23 and October 16, Respondent issued suspensions to 25 other employees for attendance policy infractions. Respondent's Exhibit No. 6 reflects that two employees were given suspensions on July 23 and September 13 because they were absent without doctor's statements. Another employee received a suspension on June 28 because he took off work for the entire day to go to the probation office. I also note that Gerald Nelson, the employee who testified in Respondent's behalf received a three-day suspension on September 7 because of his third time card discrepancy.

Respondent contends that Huggins was terminated because of his absence on September 27 and his failure to provide documentation. Respondent submitted records to show that between May 24 and September 5, five other employees were terminated pursuant to the attendance policy.

The overall evidence reflects that Huggins was terminated for his fourth unexcused absence and after receiving a verbal warning, a written warning and a suspension for previous unexcused absences. While Huggins testified that he had not read nor given notice to the attendance policy, he admitted that he was aware that his next unexcused absence could result in discharge. Prior to testifying in the August 26 Board proceeding, he had received discipline when he had failed to provide documentation of his absences and he had been excused when he had provided the required documentation. Respondent's records reflect that other employees were disciplined for the same offenses. Clearly, there is evidence of animus toward not only the Union but to Huggins specifically and I must conclude that Respondent may have welcomed the opportunity to terminate Huggins' employment. Admittedly, Scott was consciously aware of Huggins' Union activity and the risk of new charges being filed for any adverse treatment of Huggins. There is however, no evidence that Huggins was treated any differently than any other employee who violated the attendance policy.[16] Accordingly, Respondent has demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.[17] In his brief, Counsel for the General Counsel argues that Respondent gave shifting reasons for Huggins' termination. At trial, Scott went into great detail outlining Huggins' attitude and continuing complaints. The disciplinary action reporting form that was generated at the time of Huggins' discharge reflects that he was terminated because his August 27th absence was his fourth unexcused absence and he produced no documentation in support of the absence. While it is apparent that Scott took the opportunity to describe Huggins in as negative a manner as possible, I don't find that Respondent actually provided shifting reasons for the discharge. Scott simply attempted to embellish an otherwise justifiable basis for Huggins' discharge. Accordingly, I shall dismiss complaint paragraphs 9(b), (c), and (e).

In accordance with my conclusions above, I make the following:

CONCLUSIONS OF LAW

1. Sunshine Piping, Inc., Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by its written warnings to Robert Huggins on August 26, 28, 30, and September 18, 2002.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act in the other ways as alleged in the complaint.

REMEDY

Having found that the Respondent has violated Sections 8(a)(1), (3) and (4) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondent rescind the warnings given to Robert Huggins in August 26, 28, 30, and September 18, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

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[16] *Industrial Construction Services*, 323 NLRB 1037 (1997).

[17] I also note that the record contains the unrebutted testimony of Gerald Nelson who recalled that Huggins predicted that he would cause Scott to fire him.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of

ORDER

The Respondent, Sunshine Piping, Inc., Cedar Grove, Florida, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Disciplining employees or otherwise discriminating against any employee for supporting United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL-CIO, Local 366 or any other union.

(b)In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2.Take the following affirmative action necessary to effectuate the policies of the Act.

(a)Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, and within 3 days thereafter notify the Robert Huggins in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Panama City, Florida facility *copies* of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discipline you or otherwise discriminate against any of you for supporting the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Robert Huggins on August 26, 28 and 30, 2002 and September 18, 2002**,** and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him any way.

SUNSHINE PIPING, INC.

Charles R. Rogers, Esq., Stephen C. Bensinger, Esq. and *Kathleen McKinney, Esq*., for the General Counsel.
Tony B. Griffin, Esq., for the Respondent.
Curt Tharpe, State Organizer, for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. A hearing in the above-captioned case was held on April 28, 29, and 30, 2003, and I issued the decision in this matter on June 30, 2003. In my decision, I found that Respondent issued work performance disciplinary warnings to Robert Huggins, herein Huggins, in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). I did not find however, that Respondent violated the Act by disciplining and ultimately terminating Huggins under the attendance policy implemented on May 6, 2002. I found no evidence that Huggins was treated any differently than any other employee who violated the attendance policy. Specifically, I found that Respondent demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.

By a motion dated February 27, 2004, counsel for the General Counsel requested the Board to reopen the record in this case and to allow the submission of newly discovered evidence that was not previously available to the General Counsel at the time of the initial hearing in this matter. In support of its motion, counsel for the General Counsel submitted that the newly discovered evidence was contained in a witness' deposition given nearly 5 months after my June 30, 2003 decision. The

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the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

General Counsel requested the Board to remand the case to me for an in camera inspection of the deposition to determine whether General Counsel's motion should be granted. The General Counsel also requested a reopening of the hearing to receive additional testimony from the witness and other appropriate evidence relating to the issues raised by the witness' deposition. In his motion, counsel for the General Counsel submits that the witness provided evidence that Respondent's owner, Jim Scott, altered the attendance records of several employees prior to the April 2003 hearing. Counsel for the General Counsel alleges the evidence would show that Scott altered, destroyed, and created new attendance records to hide disparity in the administration of the attendance policy and to make it appear that other employees received discipline consistent with that given to Huggins.

On March 18, 2004, the Respondent filed its Opposition to Counsel for the General Counsel's Motion to Reopen the Record. In support of its opposition, Respondent submitted a number of arguments. Specifically, Respondent argued that General Counsel's motion must be denied because: (1) the motion is premature because the Board has not yet issued its decision; (2) the motion was not filed promptly upon discovery of the evidence at issue; and (3) the General Counsel has not met its burden of establishing that it has met the requirements of Section 102.48(d)(1) of the Board's Rules and Regulations for reopening the record on the basis of "newly discovered evidence." In arguing that General Counsel has failed to meet its burden under the Board's Rules and Regulations, Respondent asserts that the General Counsel has failed to meet its burden of establishing that it was excusably ignorant of the evidence and that it acted with reasonable diligence in attempting to uncover and introduce the evidence. The Respondent maintains that the General Counsel has also failed to meet its burden of establishing that the alleged evidence would require a different result than that reached by the judge. Finally, in its opposition, Respondent argues that "General Counsel be required to show cause why the motion should not be denied, given the extraordinary and highly unusual procedures followed in obtaining the alleged evidence in issue." The Respondent asserts that the General Counsel's actions are a denial of its due process rights and the ex parte deposition is in violation of the Board's own Rules and Regulations.

On May 27, 2004, the Board issued an order referring the General Counsel's motion and the issues of fact and law raised by the motion and Respondent's opposition to me for decision. Counsels for the General Counsel were directed to provide me with the deposition for an in camera review. Following an in camera inspection, the Board directed the Motion be denied through the issuance of a supplemental decision or the hearing be reopened to further explore the issues raised by the motion and opposition through record testimony. Additionally, the Board conditionally remanded the case to allow receipt of additional evidence and testimony on the unfair labor practice matters and to provide for the issuance of a supplemental decision, if appropriate and necessary. On July 8, I issued an order reopening the record and setting the matter to be heard on August 10, 2004. On August 4, 2004, Respondent filed a motion to dismiss reopening of the record and on August 5, 2004, I issued a second order finding no basis upon which to rescind the earlier order reopening the record.

Pursuant to the Board's May 27, 2004 Order and within the parameters of the order, a hearing on these matters was conducted before me in Panama City, Florida, on August 10 and 11 and on October 12, 13, 14, and 15, 2004. All parties were represented and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. The General Counsel and Respondent filed briefs, which I have duly considered. Upon reevaluation of the entire record, including the evidence received pursuant to the Board's Order, and including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I hereby make the following

FINDINGS OF FACT

I. ISSUES

The primary issue in this reopened case involves whether Respondent altered, created, or destroyed documents in anticipation of a Board hearing and in response to charges filed by the Union. If the record supports that such action was taken by Respondent, a corollary issue is whether my original decision must be modified. Over the course of the hearing, other issues arose with respect to whether the General Counsel could amend the complaint to allege an additional 8(a) (1) violation based upon the Board's holding in Johnny's Poultry[1] as well as to amend the complaint to request reimbursement of litigation expenses incurred by the General Counsel. General Counsel also seeks to strike the testimony of Union Representative Jay Cowick on the basis that he testified in violation of the sequestration order. Additionally, Counsel for the General Counsel seeks to strike all or a portion of the testimony for 15 of Respondent's witnesses based upon inadmissibility of the testimony under Rule 608(b) of the Federal Rules of Evidence. Respondent also raises the issue of whether the General Counsel has moved to reopen the record in denial of Respondent's due process rights and whether certain documents submitted by the General Counsel should be stricken from the record.

II. GENERAL COUNSEL'S ADDITIONAL EVIDENCE

A. Procedural Background

Counsels for the General Counsel called three witnesses in this reopened matter: Rodney Johnson; the Regional Director for Region 15 of the Board, Steven Phelps, and Cynthia Arledge. Regional Director Johnson, herein Johnson, testified concerning the procedural history that preceded General Counsel's Motion to Reopen the Record. Johnson testified that shortly before the issuance of my initial decision, the Region learned that a number of individuals had contacted the Union concerning testimony given in the April 2003 hearing. Learning that one of the individuals was a former supervisor, the Region consulted with the General Counsel's office in Washington concerning the ethical issue of speaking with a former supervisor. While waiting for a response from Washington, the

[1] 146 NLRB 770 (1964).

Region attempted to reach a nonsupervisory employee who had spoken with the Union. On July 17, 2003, the Region hand-delivered a subpoena ad testificandum to Cynthia Arledge (Arledge).[2] On July 23, 2003, the Region issued a subpoena ad testificandum to Arledge, requiring her presence at the U.S. District Court in Panama City, Florida on August 5, 2003. Sent by certified mail, the July 23, 2003 subpoena was received by Arledge. Johnson explained that the Region received neither testimonial nor documentary evidence in response to either of the subpoenas. Because Arledge indicated that she would invoke her Fifth Amendment rights, the Region contacted the U.S. Attorney's office on October 6, 2003, requesting limited immunity for Arledge from prosecution for perjury and for creating false documents. After obtaining the grant of immunity for Arledge on October 16, the Region sought enforcement of its subpoena to Arledge. On November 14, 2003, United States District Judge Lacey A. Collier issued an Order, requiring that Arledge obey and fully comply with the Board's Subpoena A-670383. Judge Collier further ordered that Arledge appear for a deposition at a time and place to be set by the Board. Judge Collier also granted the Region's motion to file the application for enforcement of the subpoena under seal. Pursuant to the Court's Order, Arledge was notified by letter dated November 18, 2003, informing her of her requirement to appear for a deposition on November 25, 2003 at the U.S. District Court in Panama City, Florida. In the letter notifying Arledge of her requirement to appear for the deposition, Board Attorney Charles R. Rogers explained that because the Judge granted the motion to file subpoena enforcement documents "under seal," the enforcement of the subpoena "would not be made public." On November 25, 2003, Arledge appeared and provided sworn testimony through a deposition.

Having obtained the sworn testimony of Arledge, the Region submitted to Assistant General Counsel Jim Paulsen, a December 31, 2003 recommendation to file a motion to reopen and remand to the Board. On January 29, 2004, Associate General Counsel Barry J. Kearney notified Johnson that the Region was authorized to proceed as requested.

B. Arledge's Involvement with the Attendance Policy

Cynthia Arledge began working for Respondent in June 2000. Although she was a shipping clerk during the period between May 6, 2002 and October 1, 2002, Arledge reported directly to owner Jim Scott. She was responsible for completing the production reports as well as monitoring the new attendance policy that was implemented on May 6. When the new attendance policy was implemented on May 6, 2002, Scott divided the attendance policy into assessment periods and the first period ended on November 4, 2002. As part of her responsibility, Arledge reviewed the time cards each morning and afternoon for the metal and building trades' employees, as well as for the office employees. In reviewing the time cards, Arledge documented employees' absences and tardiness. She testified that initially she was allowed to excuse attendance infractions if the employees' provided adequate documentation. She explained that at a later period, Scott no longer wanted her to designate whether the infractions were excused or unexcused and she merely completed a cover sheet that included an explanation of the employee's absence or tardiness. Arledge was unable to identify with any specificity when her responsibilities changed on documenting attendance infractions.

While Arledge could not recall the specific date, she recalled however, that after some point, only Scott made the decisions as to whether an employee's absence or tardiness was excused or unexcused. She likened the process to a "buddy system." She explained that an employee received an excused or unexcused absence based upon whether Scott liked the employee. Arledge gave examples of specific employees who were treated differently even though their infractions and the reasons for their absences were similar.[3]

Kevin Scott, Jim Scott's son, testified that he was also given responsibilities for the attendance policy from July 2002 until March 2003. Jim Scott testified that Kevin Scott's was responsible for taking care of the "simple things." Jim Scott explained that if there was appropriate documentation for an attendance infraction, Arledge could excuse the infraction. If the incident involved an unexcused first or second offense, Arledge took the matter to Kevin Scott. If the incident involved a suspension or termination, Arledge took the matter to Jim Scott for review and decision.

John Goldberg served as Respondent's Safety Director and Human Resources Director in 2002. Jim Scott, Kevin Scott, and Arledge all testified that at some point during late 2002, the responsibility for monitoring the attendance policy was transferred from Arledge to Goldberg. While Jim Scott testified that the transfer occurred between October 1 and mid-October, Kevin Scott testified that the transfer occurred between mid-October and late October. Arledge recalled that Goldberg took over her duties in about October or November 2002, while she and Scott were conducting a review of the attendance documents. Arledge testified that Goldberg did not become involved in the enforcement of the attendance policy until the Board's investigation and as she explained: "we were going to court."

Arledge recalled that at some point prior to the April 2003 trial, Scott told her that the two of them needed to review all of the employee attendance records. Arledge recalled telling Scott that the records were "fine" because she had taken care of them. Scott, however, explained to Arledge that the records needed to be reviewed because "they've got to be right." Arledge recalled that for at least 2 months, she sat in the office with Scott every day reviewing all of the attendance records. Arledge testified that not only were the files reviewed, they were also changed. Arledge explained that she and Scott reviewed each file in preparation for the trial.

Arledge described the process by which she and Scott reviewed each file:

[2] Arledge testified as a witness for Respondent during the April 2003 hearing.

[3] GC Exh. 40 reflects that Mike Lawrence received a verbal warning for a time card discrepancy on July 1, 2002 and a written warning for a second time card discrepancy on July 9, 2002. While he also had a timecard discrepancy on October 25, 2002, there is no evidence of any additional discipline administered to him.

> We would take that record and then we would flip them and go through them each, one by one. Mr. Scott was looking to see whether he liked that excuse, whether that was what's supposed to be on there, whether the record was up to par, and this is what we wanted it to say. And that's what I helped Mr. Scott do.

In reviewing the file for each employee, Scott used a form identified as "Report By Employee Name," which was a computer print-out of the hours scheduled, hours worked, as well as any instances of absence, tardiness, leaving early, or time card discrepancies for the employee for each work day. Employee time cards were also reviewed in relation to the employees' attendance record. Arledge explained that if Scott found a file that he didn't like because it was "not jiving," he "fixed" the file. She explained that because the time cards could not be changed,[4] the files were changed to correspond to the time cards.[5] Arledge recalled specifically that Scott "fixed" Robert Huggins file as well as other employees' files. Arledge and Scott created new attendance records for a number of employees including Jim Jones, Harry Nelson, Darrell Scott, and an employee identified only as Lisa. Arledge recalled that when she and Scott reviewed Huggins' file, some of the "unexcused" absences were changed to "excused" to make it appear that Respondent was not really "riding down on him." Arledge recalled that as she and Scott went through each employee's file, documents were rewritten and re-signed by supervisors. Arledge testified that the records were completely "doctored up" to reflect what Scott "wanted them to say." After Scott marked the documents to be changed, Arledge input the computer changes.

Arledge asserted that she had believed that she was helping Scott with his case and she believed that the files were to be submitted to Scott's attorney. Arledge testified that she did not realize that the files were going to be submitted to the judge. Arledge testified that after she testified as a witness in this case in April 2003, she realized that the records that had been reviewed and changed were in the possession of the court and not just the attorney. She explained that prior to testifying, she had no idea that the records were going to appear in the courtroom. She added that she had worked previously for the state of Florida for nine years and she understood what it meant to submit false documentation to a federal judge or to any kind of government. After returning from the hearing, Arledge confronted Scott about submitting the altered records to the court. She also told Scott that she would report that altered records were given to the judge. She recalled that he simply looked at her without commenting. Following that conversation, she seldom saw Scott. She recalled: "I guess that he was through with me and he didn't want to hear any more out of me." Shortly after her confrontation with Scott, Arledge was moved from the office area to the blasting area. Because of the fumes from a large acid vat, she experienced difficulty breathing. She explained that after continuing problems with dizziness, weakness, and weight loss she was hospitalized. Arledge subsequently resigned and later filed a worker's compensation claim.[6]

Arledge recalled that after leaving Sunshine Piping, Supervisor Steven Phelps came to her house to see how she was doing. As Arledge discussed her sickness and her plans to file a worker's compensation claim, Phelps admitted that he should have done something when she was moved from the office to the blasting area. Phelps told her he knew what the two of them had done was wrong and he urged her to tell the truth about what happened. Phelps added: "See what happened to you" and suggested that she set the record straight. While at Arledge's home, Phelps telephoned Union Representative Gregg Boggs. Arledge also spoke briefly with Boggs and told him that she had not been honest and she needed to talk with him. It was shortly after her telephone conversation with Boggs that Board attorney Rogers began contacting her. Arledge explained however, that after talking with Boggs, she was afraid to give a statement to the Board. She did not provide a statement to the Board until she was required to participate in the deposition.

C. Phelps' Involvement in the Attendance Policy

Steven Phelps worked for Respondent for approximately nine to ten years. Phelps began as a pipefitter and progressed to the position of plant manager. At the time that he was laid off in June 2003, he had been plant manager since the beginning of 2002. Phelps testified that prior to the hearing concerning Huggins' discharge, he observed Arledge and Scott reviewing attendance records and personnel files. He recalled that during this same period, he was called into the office to sign or re-sign attendance forms. He specially recalled that he re-signed attendance records for Robert Huggins and for David Morton. He could not recall other employees' records specifically, however he estimated that he re-signed approximately a dozen or more attendance forms.

Phelps recalled giving Huggins an unexcused absence for an incident involving his son's head being caught in a piece of furniture. During the April 2003 hearing in this matter, Respondent submitted into evidence a copy of a July 2, 2002 disciplinary action form issuing a verbal warning to Huggins for tardiness. The comments section of the document includes the wording: "Employee called said 'son stuck in couch' 6:18 a.m. on 7-02-02." Phelps recalled that prior to Huggins' unexcused absence, employee John Frye was excused for an absence involving a similar experience with his son. Phelps recalled that prior to Huggins' termination, he brought the discrepancy to Scott's attention. Phelps testified that after his calling this discrepancy to Scott's attention, Frye's absence was changed to unexcused. During direct examination, Phelps was shown General Counsel Exhibit No. 15 that was purported to be attendance records for John Frye. The parties stipulated that this exhibit was composed of records provided pursuant to sub-

[4] While the record does not reflect any details as to how the time cards are maintained, the parties do not appear to dispute Arledge's assertion.

[5] Arledge recalled that there was one time card that they could not "work around." She recalled: "Steven Phelps had to take it and do something with it because we couldn't work around that timecard. Those files had to go with that timecard."

[6] As of the time of the 2004 hearing, Arledge's worker's compensation claim had not been resolved and remained under appeal.

poena and for a period between May 5, 2002 and November 4, 2002. Phelps testified that the original disciplinary action reporting form concerning Frye's absence for his son's head being caught in the couch was not among Frye's attendance records.

Arledge recalled that another employee's absence also related to the employee's son's being stuck in a couch. Arledge recalled: "There was another gentleman who had - - his son was stuck in the couch. I believe that one got excused and one did not. And it was weird because two gentlemen called in with their sons stuck in a couch."

III. RESPONDENT'S EVIDENCE

In response to General Counsel's newly submitted evidence, Respondent presented the testimony of 20 witnesses. As described more fully below, a number of these witnesses testified concerning Arledge's and Phelps' employment conduct that was totally unrelated to Respondent's enforcement of its attendance policy and unrelated to the allegations of Scott's alteration, creation, or destruction of attendance records. Solely in the interest of due process, and while noting the objections of Counsels for the General Counsel, Respondent was allowed a degree of latitude in presenting such testimony. I advised Respondent's counsel that such testimony was allowed only as it might relate to demonstrating motivation for Arledge and Phelps coming forward after the original trial in this matter. Such testimony was not allowed as a means of impeachment on collateral matters.

Specifically, Respondent presented Kirk Stanford, David Elmore, David Owens, Gary Elmore, and Alonzo Russ who testified that they observed Phelps using prescription drugs on Respondent's premises while employed with Respondent. Lisa Hedayati and David Elmore observed Phelps's giving or exchanging prescription drugs with other employees. Employees Kathy Bailey, Timothy Speakman, Brenda Foster, Alonzo Russ, and David Owens testified concerning incidents in which Phelps bought or attempted to buy prescription drugs from employees. Gerald Nelson testified that Phelps not only promoted him to a particular job in exchange for two prescriptions for Lortabs but Phelps also sold him a piece of Respondent's equipment in exchange for 20 Lortabs. Employees Owens, Russ, Stanford, and Bailey also testified that Phelps sold prescription drugs. Bailey recalled that she and Phelps "did a line" of "crystal meth" in Respondent's machine shop during the regular workday. Employees Owens, Stanford, and supervisor Mildred Fay Burke testified that Phelps obtained drug-free urine from other employees in order to pass the mandatory drug screenings. In a further attempt to discredit Phelps, Respondent presented employees Russ and Speakman to testify that Phelps solicited and arranged for a female employee to engage in a strip tease at Respondent's facility during the regular workday. Respondent also presented witnesses who testified that Phelps confiscated tools from Respondent's facility and sold safety glasses to employees that he received as a promotional item from one of Respondent's vendors. As discussed later in this decision, Respondent also presented some brief testimony with respect to Arledge's involvement in the drug activity at Respondent's facility.

The record reflects that when the attendance policy was implemented in May 2002, all of the prior attendance infractions became void and employees began with a new slate. Progressive discipline was imposed based upon the number of attendance infractions within the initial six-month period. In rebuttal to the testimony of Arledge and Phelps, Scott testified concerning his review of the attendance files. Scott testified that during the first 6 months of the attendance policy tracking or assessment period,[7] he became aware of errors made by Arledge in her monitoring of the attendance policy. Scott also asserted that he noticed that Arledge was "favoring personnel." Scott testified that because of Arledge's errors, he reviewed the "whole system." Scott asserted that he not only became more involved in the attendance policy program, he eventually took the program away from Arledge and reassigned the duties during the latter part of the first tracking period. Scott testified that prior to removing the assignment from Arledge, he asked her to sit down with him to go over the files document by document. Scott testified that he could not recall the exact date that he and Arledge went over the files, however he believed that it had been approximately 2 months before the end of the first tracking period that began in May 2002. Scott asserted that he and Arledge reviewed the attendance records and the time cards for each employee and that records were changed to correct errors. Scott testified that disciplinary action forms were changed from "excused" to "unexcused" or vice versa were as a result of his 2002 audit with Arledge. He explained that when he found attendance records that required correcting, he marked the alterations in red and gave them to Arledge who entered the new information into Respondent's computer database. After changes were made in the attendance records, Arledge created a new database printout. He assumed that the old printout was then destroyed or thrown away.

IV. ANALYSIS AND CONCLUSIONS

A. Whether General Counsel Violated Respondent's Procedural Due Process Rights

In its brief, Respondent argues that Region 15 acted under a shroud of secrecy during this proceeding. Respondent argues not only that the Counsel for the General Counsel failed to timely inform the administrative law judge of the information obtained from the Union regarding the secret witness, but also failed to timely inform the Board of the "newly-discovered information." Respondent contends that the General Counsel subpoenaed the witness ex-parte and filed a motion with the court ex-parte and under seal. Respondent asserts that by using this secret evidence to seek a re-opening of this case, General Counsel violated Respondent's due process rights.

Citing *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), Respondent asserts that it was entitled to procedural due process in this re-opened proceeding. In its decision in *Soule Glass and Glazing Company*, the First Circuit Court of Appeals stated: "Due process requires that persons charged with unlawful conduct be given prior notice of the charges and

[7] The record reflects that the first six months of the attendance policy was the initial tracking period for evaluating attendance policy infractions.

an opportunity to be heard in defense before the government can take enforcement action." The court also explained "Due process prohibits the enforcement of a finding by the Board of a violation neither charged in the complaint nor litigated at the hearing." Id at 1074. I note however, that the Court also acknowledged that the courts have recognized the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that the issue was not specifically pleaded. The court explained that the applicable test is "one of fairness under the circumstances of each case" and "whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." Id. at 1074. In further support of its argument, Respondent cites an administrative law judge's decision that references the court's holding in *Soule Glass and Glazing Company*.

As counsel for the General Counsel points out in his brief, a party may move to reopen the record on the basis of "newly discovered evidence" under Section 102.48(d)(l). To satisfy the requirements of this section the moving party must show that (1) the evidence existed at the time of the hearing, (2) the movant is excusably ignorant of the evidence, (3) the movant acted with reasonably diligence in uncovering had introducing the evidence, and (4) the evidence would require a different result than that reached by the judge. Counsel for the General Counsel argues that General Counsel has proven each of these factors and I concur.

There is no dispute that if Respondent altered its attendance policy records, it did so prior to the April 2003 hearing. Clearly, such alleged altered records existed at the time of the original hearing in this matter, meeting the first criteria for General Counsel's motion to reopen.

In its March 18, 2004 opposition to General Counsel's motion to reopen the record, Respondent's counsel argues "Because Counsel for the General Counsel has offered no information about the investigation of this matter, he has not met his burden of showing that he was excusably ignorant and acted with reasonable diligence in attempting to uncover this alleged witness's testimony prior to the hearing, or in introducing it at the hearing." Specifically Respondent argues that Counsel for the General Counsel has offered no information about "whether he interviewed anyone prior to the trial or called the secret witness for any purpose at trial." Respondent further argues that Counsel for the General Counsel has not shown a scintilla of evidence to reflect that he was "excusably ignorant" of the alleged evidence. Contrary to Respondent's assertions however, the record reflects that Cynthia Arledge was called as a witness on behalf of Respondent in the April 2003 trial. Without extrasensory perception, there would have been no basis for Counsel for the General Counsel to seek out Arledge prior to the April 2003 trial. The record reflects that it was only because of Arledge's telephone call to Union Organizer Greg Boggs that Counsel for the General Counsel had any reason to contact Arledge. Additionally, as Counsel for the General Counsel points out in his brief, Scott testified during the April 2003 trial that the attendance records introduced at the trial were true and accurate representations of his business records. Until Arledge contacted the Union, there would have been no reason for Counsel for the General Counsel to have known that Respondent's exhibits were anything other than what Respondent purported them to be. Thus, General Counsel was clearly excusably ignorant of any alleged alteration of documents prior to the newly discovered evidence. Additionally, the record reflects that once Counsel for the General Counsel learned of the alteration of the attendance records, the Regional Office initiated proceedings to obtain evidence that would be admissible and would support a motion to reopen the record. There is no dispute that even though Arledge initially spoke with the Union representative, she refused to cooperate with the Regional office, even when subpoenaed to do so. The Region was forced to petition the United States District Court for subpoena enforcement. It was not until December 5, 2003 that the Region obtained a deposition from Arledge and admissible evidence in its possession to support a motion to reopen the record. By December 31, 2003, the Region recommended to the General Counsel to seek to reopen the record and on January 20, 2004, the General Counsel's office notified the Region to proceed with the motion to reopen the record. On February 27, 2004, counsel for the General Counsel completed its Motion to the Board seeking to reopen the record. Based upon the lack of cooperation from Arledge and the administrative delay of seeking enforcement, as well as the time required for seeking authorization from the Office of the General Counsel, I find that Counsel for the General Counsel acted with reasonable diligence in uncovering and presenting this newly discovered evidence.

In its opposition to counsel for General Counsel's motion to reopen the record, Respondent also asserts that General Counsel failed to meet its burden of establishing that the alleged evidence would require a different result than that reached in the initial decision. Respondent argues: "Specifically, all CGC has to offer is the testimony of one unnamed witness who alleges that Respondent destroyed and altered attendance documents, and that Respondent applied its attendance policy in an inconsistent manner." Respondent contends that Counsel for the General Counsel is offering bare, unsubstantiated assertions in an effort to impeach or to call into question the sworn testimony of Respondent's witnesses that the attendance documents provided were accurate, and that the attendance policy was applied consistently. I find no merit in Respondent's argument. As stated above, a significant factor in my initial decision was my finding that Respondent met its *Wright Line*[8] obligation by showing that Huggins would have been disciplined even in the absence of his protected activity. Relying upon Respondent's attendance records, I found that Respondent disciplined other employees in the same manner and for the same reasons that it disciplined Huggins, establishing a lack of disparity in the enforcement of its attendance policy. The evidence identified in counsel for the General Counsel's motion expressly relates to the issue of whether there was a true lack of disparity. Finding disparity in the enforcement of the attendance policy would clearly require a result different from that reached in my initial decision.

[8] 252 NLRB 1082 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The Respondent argues that it was prejudiced by the "secret" nature of the proceedings leading up to the reopening of this case. In his brief, Counsel for Respondent argues that Respondent has "suffered many unfair attacks by Region 15." Respondent asserts that the Region attempted and lost a Section 10(j) injunction effort and also lost most of its allegations regarding a mass layoff and recall that were litigated in a proceeding prior to this matter involving discriminatee Robert Huggins. Respondent contends that Region 15 continued with what Respondent characterizes as "unfair and improper efforts" against this employer with "eight months of secret proceedings, going to federal district court, and conducting an ex parte deposition of a secret witness presented by ex-Union Business Agent, Greg Boggs." Respondent argues that the identities of witnesses or allegations for Region 15 were not disclosed to Respondent or Respondent's counsel until after commencement of the reopened hearing. Respondent also asserts that because two attorneys for the Region participated in taking Arledge's deposition, due process was violated. In support of this premise, Respondent asserts, "It is a basic premise of procedural due process that tag team ex-parte inquisitions are not allowed." Respondent, however, cites no Board or court authority for such a premise in Board proceedings.

In its brief and throughout the proceeding, Respondent continued to argue that Region 15's actions in this proceeding and prior proceedings were based upon some independent animus or bias against Respondent. Despite Respondent's continuing assertion, I found nothing to support this argument. The fact that the Region has previously sought injunctive relief and has issued complaints against this Respondent in this proceeding and in a prior proceeding does not support a finding that the Region has done anything other than to administer the Act as required. As counsel for the General Counsel points out in his brief, there is no provision for discovery within the Board process.[9] In this instance, the Region deposed Arledge rather than using the traditional Board affidavit. Based upon Arledge's reluctance and previous refusal to give an affidavit to the Region, and based upon the order of the United States District Court, such a course of action was appropriate. There was however, neither a requirement for the Region to inform Respondent of this deposition nor a requirement to allow Respondent to participate in this deposition. As in any Board proceeding, there was no requirement for counsel for the General Counsel to inform Respondent of the identify of this witness or any other witness prior to the witness testifying in a Board proceeding. While Respondent also argues that the allegations for the reopened hearing were not disclosed to Respondent, Counsel for the General Counsel's initial motion to reopen the record defeats such argument. The nine-page motion clearly identifies that the newly discovered evidence comes from a witness who worked for Respondent during the period when the alleged unfair labor practices occurred. Specifically, counsel for the General Counsel asserted that the witness would testify that Jim Scott altered the attendance records of several employees prior to the April 2003 hearing. Additionally, the motion describes in detail how Scott altered the records to make it appear that Huggins was disciplined consistent with other employees. Clearly, the motion contained greater specificity than a traditional complaint that initiates a Board proceeding. Accordingly, I find nothing to indicate that the Region acted improperly in securing the evidence upon which it filed its motion.

In summary, I find that counsel for the General Counsel has fully met all of the requirements of Section 102.48(d) of the Board's Rules and Regulations that allows the reopening of this record. Additionally, I find nothing in the record to support Respondent's assertions that the Region acted improperly in securing the evidence upon which it filed its motion or in failing to disclose the identity of witnesses prior to the reopening of this matter.

B. Respondent's Evidence Concerning Phelps' and Arledge's Conduct

If even half of Respondent's witnesses are to be credited, it is apparent that Phelps was anything but a model employee. Based upon these witnesses' testimony, the argument may also be made that he engaged in activities at Respondent's facility that served his own financial and personal interests and needs. The overall record testimony also demonstrates that he was by no means, the only employee who was actively involved in the use and exchange of prescription drugs. As a supervisor however, he was in a position that may have allowed greater freedom to engage in such activities. Respondent asserts that because Phelps' layoff terminated his opportunity to further engage in such conduct, his testimony is motivated by the loss of employment that allowed him to engage in such conduct. There is however, no record evidence that Phelps was terminated or that his layoff was for anything other than a reduction in force. Despite Respondent's assertions, Respondent presented no witnesses to testify that Phelps protested or resisted the layoff in any way. The only witness who provided any evidence that could arguably reflect a motive for revenge toward the Respondent was officer David Kania of the Bay County Sheriff's Department. Officer Kania confirmed that approximately a month after Phelps layoff, he investigated a burglary and theft at Respondent's facility. Because Phelps previously had keys and access to the facility, he was considered a suspect. Although he was questioned and polygraphed by the Sheriff's Department, he was never charged with the crime. There was however, no evidence that Phelps said or did anything following the investigation to demonstrate animosity toward the Respondent for his being a suspect in the Sheriff Department's investigation.

With respect to Cynthia Arledge's involvement in the drug activity at Respondent's facility, Respondent presented the testimony of employee Brenda Foster, who testified that she observed Arledge giving prescription medication to Phelps. Foster also testified that Arledge provided drug-free urine to some employees for them to pass the mandatory drug screening. By Arledge's own admission, she was involved in a court-ordered drug program during a portion of her employment with Respondent. The fact that she may have given prescription drugs to other employees or even helped to undermine the va-

[9] Neither the constitution nor any statute requires making pre-hearing discovery routinely available. *David R. Webb Co.,* 311 NLRB 1135, 1135–1136 (1993).

lidity of Respondent's drug screening program is not sufficient to discredit her testimony in the present proceeding. Having heard the overall testimony, I find nothing in this collateral evidence that provides a basis for impeaching the credibility of either Arledge or Phelps.

Rule 608(b) of the Federal Rules of Evidence expressly prohibits the use of "extrinsic" evidence of a witness' conduct (except for certain types of criminal convictions) to impeach the witness. Inquiry into such conduct is permitted, only if, in the discretion of the court, such conduct is probative of truthfulness or untruthfulness. See *U.S. v. Morrison*, 98 F.3d 619, 628 (D.C. Cir. 1996). Respondent argues that both Arledge and Phelps denied on cross-examination any involvement in drug sales, purchases, and other misconduct while employed at Respondent's facility. Respondent argues that its witnesses at trial provide credible evidence that Phelps and Arledge were not truthful in their responses. There is no dispute that the Board and the Courts have found that under Federal Rule 608(b); a witness' denial on cross-examination of a collateral matter precludes counsel from producing extrinsic evidence to contradict him. The extrinsic evidence is not considered for impeachment or for any other purpose. *Bronx Metal Polishing Co.*, 276 NLRB 299 (1985); *U.S. v. Bosley*, 615 F.2d 1274 (9th Cir. 1980). It is the established rule that when a witness is cross-examined for the purpose of discrediting his veracity by proof of specific acts of misconduct not the subject of a conviction, the examiner must take his answer as it is given and is not free to bring independent proof to show that the answer was untrue. *Foster v. U.S*, 282 F.2d 222, (10th Cir. 1960). The Board has long held that collateral evidence is not relevant to questions of veracity and therefore not admissible to impeach the witness. *Washington Forge*, 188 NLRB 90 (1971). Furthermore, the Board has long established that it is within the discretionary authority of the administrative law judge to apply the evidentiary limitation on impeachment of a witness in a collateral matter. *Tomatek, Inc*., 333 NLRB No. 156, fn. 36 (2001); *New York Sheet Metal Workers, Inc*., 243 NLRB 967, fn. 3, (1979); *Continental Wirt Electronics*, 186 NLRB 56 (1970).

In his brief, Counsel for Respondent acknowledges that under 608 of the Federal Rules of Evidence, evidence of specific instances of conduct offered for the sole purpose of attacking the witness' truthfulness may not be proven by extrinsic evidence. Citing *U.S. v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) and *U.S. v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), Respondent asserts that Rule 608(b) does not prohibit the use of extrinsic evidence to prove bias, competency, and impeachment by contradiction. Respondent also argues that under Federal Rule 404(b),[10] evidence of other crimes, wrongs, and acts may be admitted into evidence when offered not to prove character, but for other purposes, such as proof of motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident. Citing *Huddleston v. U.S.*, 485 U.S. 681, 686 (1988), Respondent submits that the threshold inquiry for a 404(b) analysis in both civil and criminal cases is whether the evidence is probative of a material issue other than character. Respondent argues that the offered testimony in this case is admissible and highly probative on the issues of (1) Phelps' and Arledge's bias toward Sunshine Piping; (2) Phelps' and Arledge's ability to accurately recall and relate the events in dispute; and (3) the contradiction of Phelps' and Arledge's testimony denying that they used and were dealing drugs at work.

In *U.S. v. Castillo*, the issue before the court was whether evidence of the defendant's prior cocaine arrest was admissible as impeachment by contradiction. In referencing two earlier Ninth Circuit decisions, the Court pointed out that extrinsic evidence might not be admitted to impeach testimony invited by questions posed during cross-examination. The Court went on to explain: "Courts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination." While the court added that it was not finding that a bright line distinction between testimony volunteered on direct examination and testimony elicited during cross-examination must be rigidly enforced so as to exclude all impeachment by contradiction of testimony given during cross-examination, the court nevertheless expected that the exception to the rule would apply to those rare situations where the testimony on cross examination was truly volunteered. *U.S. v. Castillo*, supra at 1134. In *U.S. v. Tarantino*, the court discussed exclusion of collateral evidence used for impeachment. While the court did not find the testimony in issue to be collateral, it nevertheless concluded that its exclusion by the trial court was not an abuse of discretion. *U.S. Tarantino* at 1410. Upon review of these cases and others[11] cited by Counsel for Respondent in his brief, I find nothing that would support the admission of the collateral evidence offered in this matter. In his brief, counsel for Respondent asserts that both Arledge and Phelps volunteered the issue of drug use on direct examination. Counsel does not however, cite any transcript reference in support of this bare assertion. While Arledge confirmed on direct

[10] Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

[11] In *U.S. v. Fleming*, 19 F.3d 1325, 1331 (10th Cir. 1994), cited by Respondent, the court found that the limitations of Rule 608(b) did not apply when extrinsic evidence is used to show that a statement made by a defendant on direct examination is false, even if the statement is about a collateral issue. In *U.S. v. Cardenas*, 895 F.2d 1338 (11th Cir. 1990), the court found that witnesses' testimony as to defendant's prior offenses of narcotics possession and distribution was admissible to contradict material testimony of defendant charged with cocaine distribution, conspiracy, and cocaine possession with intent to distribute. In *U.S. v. Mateos-Sanchez*, 864 F.2d 232 (1st Cir. 1988), the court allowed extrinsic evidence of marijuana being found in the defendant's brief case after he testified that he did not use drugs. Inasmuch as the defendant was tried for possession, importation, and intent to distribute cocaine, it is not surprising that the court found that the defendant's personal use of drugs could be particularly probative of motive, knowledge, or absence of mistake or accident. Respondent concedes that other cases cited dealt with impeachment by contradiction when the party or witness against whom it is used testified as to the collateral matters on direct examination or otherwise opened the door on the issue. *Jones v. Southern Pacific R.R.*, 962 F.2d 447, 450 (5th Cir. 1992); *U.S. v. Benedetto*, 571 F.2d 1247, 1230 (2d Cir. 1978).

examination that she had been on probation with a suspended license at the time of her employment with Respondent, she neither testified concerning drug use nor denied drug use as Counsel for the Respondent gratuitously asserts in his brief. Phelps' direct testimony did not in any way relate to anyone's drug use. Accordingly, there is no basis in fact for Counsel's assertion and such a blatantly erroneous assertion undermines the persuasiveness of Respondent's brief.

Respondent argues that impeachment by contradiction with collateral facts is governed by 607 of the Federal Rules of Evidence and the balancing test under Rule 403, not Rule 608. Respondent also argues that courts should more liberally allow impeachment by contradiction on matters elicited on both direct and cross-examination. Despite counsel's opinion that the courts should more liberally allow impeachment by contradiction, he provides no Board authority in support of his argument. Respondent characterizes the testimony in issue as "impeachment by contradiction" and argues that such a means of impeachment is outside the scope of the limitations of Federal Rule 608(b). Clearly the testimony that Respondent seeks to be considered deals with matters not only unrelated to whether Respondent altered attendance records but also unrelated to any substantive issue in this proceeding. If not to impeach the credibility of Phelps and Arledge, there is no apparent relevance. Accordingly, I find no basis to consider this evidence as impeachment by contradiction.

Respondent argues that the testimony relating to Phelps' and Arledge's prior conduct in the workplace shows that their testimony concerning the alteration of the attendance records was biased. Respondent argues that the testimony is issue shows that when Phelps was laid off, he lost a source of drugs and lost income from the sale of drugs and company-owned equipment. Respondent also points out that Phelps was the lead suspect in a police investigation of break-ins at Respondent's facility. Respondent asserts that the testimony in issue shows that Arledge had a strong motive to retaliate against Respondent because she lost drug connections and did not receive compensation from her worker's compensation claim. Citing *U.S. v. Farias-Farias*, 925 F.2d 805, 811 (5th Cir. 1991), Respondent asserts that the disputed testimony is admissible because extrinsic evidence of prior bad acts is admissible to show bias and prejudice. I do not find the case cited by Respondent to be controlling in this situation. In *U.S. v. Farias-Farias*, the court noted that Rule 608(b) is not intended broadly to restrict the introduction of exculpating or incriminating substantive evidence. Evidence concerning the defendant's false statements given at the time of his arrest as substantive evidence of guilt was found to be admissible despite the restrictions normally imposed by Rule 608(b).

As otherwise stated in this decision, I do not find that the testimony in issue demonstrates bias or prejudice by Phelps or Arledge. As noted above, there is no evidence that Phelps protested or resisted his layoff as a part of Respondent's reduction in force. There is absolutely no evidence that Phelps said or did anything to demonstrate animus toward Respondent for his layoff or even for his having been questioned by the authorities concerning the theft at Respondent's facility. As also otherwise noted, there is no evidence that Arledge's testimony was motivated by bias or prejudice. It is undisputed that she quit her employment and was not the subject or discipline or discharge. She testified without dispute that her contact with the Union concerning the altered documents occurred prior to her filing any claim for worker's compensation. Accordingly, I do not find Respondent's collateral evidence admissible as bias or prejudice.

Respondent also contends that the disputed testimony is admissible to show the capacity of Arledge and Phelps to accurately recollect and relate. Respondent asserts that the testimony concerning the drug use of Phelps and Arledge is highly probative of their ability to recollect and understand whether Respondent improperly altered the attendance records. The overall record evidence belies any validity to this argument. While Respondent now argues that Phelps was under the influence of drugs and therefore impaired in memory and functioning, Phelps nevertheless held the position of production manager in 2002 and until his layoff in 2003. Had Phelps' functioning been impaired to the extent argued by Respondent, it is doubtful that Scott would have allowed him to maintain in such a responsible position. I also note that Respondent had sufficient confidence in Phelps that Phelps was called as Respondent's witness in the April 2003 trial.

While Respondent argues that Arledge's testimony may be impeached because of extrinsic evidence of drug use and involvement, Respondent's argument is even less compelling than with the argument made for Phelps. As noted above, Respondent certainly presented a plethora of testimony concerning Phelps' involvement in drug use and trafficking in the workplace. By contrast however, Respondent's evidence concerning Arledge's involvement in drugs was minimal. While Respondent's witnesses testified that she had shared prescription drugs with other employees and had even provided clean urine to employees in order that they might pass drug screenings, the evidence also reflects that for a substantial portion of the relevant period, she was involved in a drug rehabilitation program and required by the court to undergo routine drug screenings. Thus, the overall evidence simply does not reflect that Arledge's recall was impaired or could have been impaired because of drug activity.

In summary, Respondent argues that the evidence of prior specific acts is offered and probative on other grounds and not solely to attack the witnesses' truthfulness as contemplated by Rule 608(b). I have considered Respondent's arguments and I do not find the proffered evidence to be probative or admissible on bias, competency, or impeachment by contradiction. Counsel for the General Counsel argues that the testimony involving these collateral issues be stricken from the record. While I do not grant Counsel for the General Counsel's motion, I find no relevance in such testimony and place no reliance upon this testimony concerning clearly collateral matters.

C. Analysis of Arledge's Testimony and the Attendance Records

As discussed in my June 30, 2003 decision, Respondent implemented a new attendance policy on May 6, 2002. The policy provides for progressive discipline for its infractions and the progression includes a verbal warning, a written warning, a

suspension, and ultimately discharge for any one of the four types of violations. The policy can be violated when an employee is absent, tardy, leaves early, or has a timecard discrepancy that is not excused. The policy provides that four unexcused incidents of the same kind of violation occurring in any twelve (12) month calendar period will result in discharge. With respect to the attendance policy, the complaint that issued in this case alleged that Respondent unlawfully issued Huggins a verbal warning on September 18, 2002 as well as written warnings on August 30, 2002 and September 13, 2002. Additionally, the complaint alleged that Huggins' suspension on September 4, 2002 and his termination on September 30, 2002 violated Sections 8(a)(3) and (4) of the Act. The attendance records submitted by Respondent at trial demonstrated that prior to testifying in an August 26, 2002 Board proceeding, Huggins received discipline when he failed to provide documentation of his absences and he had been excused when he had provided the required documentation of his absences. The records also established that other employees were disciplined for the same offenses for which Huggins received discipline. Specifically, I noted in my decision that Respondent's records confirmed that during the relevant time period 105 other employees received verbal warnings and 53 other employees received written warnings. I also found it significant that during this same time period, 25 other employees received suspensions and 5 other employees were terminated. Thus, relying in large part upon Respondent's attendance records, I found that Respondent demonstrated that it would not only have disciplined Huggins, but would also have terminated him under the attendance policy, even in the absence of any protected activity.

As discussed above, Arledge testified that prior to the April 2003 trial, she participated in the review and reconstruction of Respondent's attendance policy documents. Arledge recalled that during the records review, Scott used red ink to make changes in the original attendance records. After completing the review of the record, new documents were created and Arledge made the necessary changes in the computer to correspond to Scott's changes in red ink. She recalled that once the changes were made in the computer, a corrected printout of the employee's attendance was printed.

Scott testified that after changes were made in the attendance files, Arledge input the changes into the attendance database and then printed a new database summary for his review and comparison with the former printout. Scott testified that he assumed that she threw away the old database printout. Scott did not testify as to what happened to the corrected or changed disciplinary action forms. Arledge testified that she had understood that the documents containing the changes in red ink were later destroyed.

Counsel for the General Counsel submitted into evidence a number of documents from various employees' attendance files. While Respondent disagrees with the relevancy of many of these documents, there is no dispute that the documents were copies of records that were subpoenaed by Counsel for the General Counsel in anticipation of the reopened hearing. Counsel for the General Counsel asserted that many of the documents were color-copied for their submission into evidence. Those documents that are color-copied demonstrate different colors of ink for the completion of the disciplinary action forms. Other documents that are not color-copied demonstrate some differences in print shading. A substantial number of the documents submitted by counsel for the General Counsel reflect changes and modifications to disciplinary action forms. Based upon the disciplinary action forms admitted into evidence, it is apparent that at least a number of the forms changed during Scott and Arledge's 6-week review were left in the attendance files.

Counsel for the General Counsel submitted attendance records for employee Kenneth Graff[12] that include a disciplinary action form with an original date of May 22, 2002, that is corrected to May 21, 2002. The following notation is found in blue ink: "Employee was absent on May 21, 2002 with no prior permission. Employee has prior permission for 5-22-02. Employee did call work states car problems." Also originally written in blue ink is the notation: "2nd Un-excused absence." The document also contains red ink and yellow highlighting noting: "Employee has receipt for old car – to fix other car per: Mr. Scott—said receipt would excuse Employee—" The original wording "2nd Un-excused absence" is marked through in both red and yellow highlighting. The red ink additions and corrections on Graff's disciplinary action form convert the absence from unexcused to excused.

Arledge also testified that during the review of the attendance records, Katherine Gay's file was changed[13]. Arledge recalled that while some of Gay's absences and tardiness had not previously been considered for disciplinary action, Scott added additional documents and changed the file during the pre-trial review. Arledge also recalled that at Scott's direction, she prepared typewritten notes explaining why earlier discipline had not been administered to Gay. Counsel for the General Counsel submitted into evidence a disciplinary action form for Gay that is dated June 11, 2002. The form appears to be a copy of the original document and does not reflect the ink color for any notation on the document. The document contains what appears to be more than one person's handwriting in different print shades and is signed by Supervisor Kevin Scott. In one person's handwriting are the words "Excused Tardy" and "Employee is in Shipping Dept—Family Problems." In what appears to be a darker print and another person's handwriting are the words "Suspension on 6/25/02" and "Unexcused per JRS." Written above and in front of the word "Excused" are "3rd" and "Un" and appear to be written in a darker print and different handwriting. Gay's record also contains a typewritten note that is dated June 21, 2002 and signed by Scott. The note states:

> I WAS NOT MADE AWARE OF KATHERINE K [G] AY'S BEING TARDY A THIRD TIME, UNTIL I WAS INFORMED OF HER TARDY ON JUNE 18, 2002 AT 7:13 A.M., AT WHICH TIME I TOOK DISCIPLINARY ACTION AND SUSPENDED THIS EMPLOYEE FOR THREE DAYS. THREE DAYS SUSPENSION EFFECTIVE ON JUNE 25 THRU JUNE 27, 2002 AND HOPE THAT SHE (KATHERINE GAY) WILL CONFORM TO THE RULES AND REGULATIONS OF COMPANY POLICY AS SHE IS A GOOD EMPLOYEE DESPITE HER EXCESSIVE TARDIES.

[12] GC Exh. 26.
[13] GC Exh. 17.

Arledge identified the above-typewritten note as one that she prepared at Scott's direction when Gay's file was altered. Although the note is dated June 21, 2002, Arledge testified that it had been prepared when she and Scott reviewed the files prior to the April 2003 hearing. Gay's file also contains disciplinary action forms dated May 15, 2002 and May 20, 2002 and relate to tardiness. The disciplinary action form dated May 20 documents that Gay received a written warning for her second tardy. The disciplinary action form for May 15, 2002 includes the notation: "Employee did call and let Supervisor know that she would be late. Sister had car problems [.] An Employee went to pick her up." Written underneath this notation is the additional wording: "This is the Employee's (illegible) Tardy." The word appears illegible as the original word or notation is covered by darker markings, however, the notation appears to be changed to "1st."

Arledge also recalled that changes were made to the file for Gerald Nelson[14]. Arledge identified a disciplinary action form in Nelson's file dated September 25, 2002. The comment section of the document reflects that Nelson did not return from lunch until 12:39. The form indicates that initially the incident was considered to be his first unexcused tardy. The notation of "1st unexcused" is marked through and the word "excused" is circled. In parenthesis are the words "Prior permission given." Arledge explained that she and Scott changed the absence to excused because otherwise a first unexcused tardy would have "messed up" his record. Accompanying the September 25, 2002 disciplinary action form and the computer printout for the incident is a document entitled "Request for Time Off" dated September 25. The form is signed by supervisor Harry L. Nelson and Vice President Kevin Scott. It does not include the employee's signature. The form explains that the employee went to his son's school during lunch and "Prior permission requested with management." Arledge explained that during the 2003 records review, she and Scott added forms such as this to substantiate that attendance infractions were excused.

Arledge also testified that she vaguely recalled changes made to Nelson's file concerning a July 5, 2002 incident in which he left early. While the form reflects that Nelson was initially given a verbal warning for leaving work at 3:21, the form includes the additional wording: "Prior permission" and the word "Excused" is circled. The letters "UNX" are marked through and initialed by Scott. Arledge explained that this incident was changed to excused because otherwise his record would have necessitated a subsequent suspension that was not substantiated by his timecard.

Arledge recognized disciplinary action forms that had been changed in Rachael Cutchen's attendance records.[15] Arledge testified that she and Scott altered Cutchen's disciplinary action form dated May 16, 2002 to change a second unexcused tardy to a first unexcused tardy. The document identified by Arledge reflects that the "2nd tardy" has been marked through and changed to "1st unexcused per Mr. Scott." The disciplinary action form for Cutchens dated September 5, 2002 reflects that the original designation of "2nd" time card discrepancy has been marked through. Arledge recalled that this timecard discrepancy would have been the third for Crutchens triggering her suspension. Arledge testified that the records were "fixed" to avoid the suspension.

Arledge confirmed that the disciplinary action form for Robert Waldrup originally dated May 14, 2002, and changed to an effective date of May 13, 2002, was altered.[16] The comments section of the document reflect that the employee was absent on Monday May 13 because he was still on medication from a doctor's appointment from a dental appointment on the previous Friday. The comments confirm that his supervisor excused him. The document reflects however, different handwriting that designates the absence as unexcused. Arledge explained that Scott changed records from excused to unexcused in order that Respondent would not appear biased.

Arledge testified that she had not wanted to come forward to give a statement or deposition to the Board because she feared Scott and what he might do to her. In explaining why she thought that Scott would retaliate against her, she recalled conversations with Scott about employees who had supported the Union. She recalled that her told her on numerous occasions that he would get rid of the employees who had signed the Union "form." Arledge testified that Scott told her that he had a list of employees who had "signed the union." She heard Scott tell Phelps to give Huggins a hard time, including the worst jobs that Huggins would have difficulty performing. Scott had also directed her to scrutinize Huggins' time card. She added that because of Scott's personality and vindictiveness, she feared that Scott would take action against her. When asked why she believed Scott to be vindictive, she explained that she had worked beside him and heard him every day.

As a further example of why she feared retaliation from Scott, she recalled Scott's comments involving employee Gary Elmore. She explained that while Elmore initially signed the "union paper," he later came to Scott and tried to make amends for what he had done. Elmore apologized and volunteered to go to all the employees who had signed for the union and get them to sign another document stating that they had not understood what they had done. Arledge recalled:

> And I watched Mr. Elmore pour his heart out, and I seen him go around with this paper, and Mr. Scott looked at me, and he said, That son of a bitch ain't going to work here. Let him get all my signatures; I'll get him.

While Arledge quit her employment approximately a month after the 2003 hearing, she nevertheless feared retaliation from Scott. During Arledge's employment, there was no secret that she was required to attend drug court and undergo daily drug testing. At the time that she left Sunshine Piping, Inc. and continuing until the time of the 2004 hearing, Arledge's driver's license remained suspended. Arledge testified that because of Scott's ties to the local police, she feared that he could retaliate against her and report that she sometimes drove on the suspended license.

[14] GC Exh. 20.
[15] GC Exh. 24.
[16] GC Exh. 44.

D. Credibility Determinations Concerning Arledge and Phelps

The Respondent argues that Arledge and Phelps cannot be credited for a number of reasons. As described above, Respondent presented a plethora of witnesses who testified concerning Phelps' involvement in the trafficking and abuse of prescription drugs while employed as a supervisor in Respondent's facility. While this collateral evidence reflects that such conduct may have been inappropriate or unlawful, it cannot be used as a basis to discredit Phelps' direct testimony in this matter. I would note however, that Phelps' testimony lacked a sufficient degree of specificity with respect to the issue of whether records were fabricated and destroyed.[17] At best, his testimony provided some degree of corroboration for Arledge's testimony. He did however, corroborate that he observed Arledge and Scott reviewing the attendance records during the period prior to the April, 2003 hearing. He also recalled that he was asked to re-sign attendance records during this period of time. Respondent argues that Phelps testified against Respondent as a means of retaliating against Respondent for his loss of employment. As discussed above however, I find nothing in the record to support such a proposition. There is nothing to reflect that Phelps harbored any animus toward Respondent for his layoff resulting from a reduction in force. Had Phelps fabricated his testimony solely to avenge his layoff, his testimony would surely have been more expansive and damaging. At best, he simply corroborated a portion of Arledge's more complete testimony. Accordingly, his testimony is less suspect because it is without apparent exaggeration. In view of Phelps' overall testimony, I find him to be a credible witness.

Respondent also asserts that Arledge is not believable for a number of reasons. Respondent contends that Arledge is not credible because Respondent's witnesses contradicted her denials on cross-examination of any involvement in the drug activity at Respondent's facility.[18] Respondent also argues that Arledge is not credible because Respondent contested her claim for worker's compensation that she filed after leaving Respondent's employment. I note however, that Arledge testified without rebuttal that she spoke with Union Representative Boggs before she filed a worker's compensation claim.

There is no question that Arledge exhibited emotional distress during her testimony. Because of her emotional state, the completion of her cross-examination was interrupted and ultimately delayed until the following trial day. After a significant number of hours of cross-examination, Arledge was offered additional time to regain her composure. She responded:

> No, I need to go home. That's all. I just need to get out of here. I don't even care if you all hang him or not. It don't matter to me. I mean, he's the one—she[19] [he] duped you, not me.

While Arledge was emotional and at times almost tearful, her testimony was overall consistent and without apparent embellishment or fabrication. There is no dispute that Arledge participated in giving a deposition only because she was under order of the United States District Court. Based upon her actions during the August and October trial dates, I have no doubt that her testimony in the Board hearing was given only because of the outstanding subpoena. At least twice during the proceeding, she was reminded by counsel and by the undersigned that she was not released from the subpoena. While she appeared to be frustrated and even somewhat resentful of the government's requirement that she participate in the Board process, she nevertheless testified consistently and credibly. She clearly appeared as a witness who told the truth despite a reluctance to participate in the process. I found her testimony to be totally credible. There was nothing in her demeanor to indicate in any way that her testimony was contrived, prevaricated, or motivated by her desire to retaliate against Respondent. Her reluctance to testify actually enhanced her credibility. Having heard this witness testify on direct and cross for extended hours of examination, I am convinced that her testimony was an accurate and truthful recall of the events preceding the April 2003 hearing in this matter. I find nothing in her testimony or demeanor to reflect a lack of competency or bias as Respondent asserts. I find her testimony to be credible evidence that Respondent altered, created, and destroyed a number of attendance records in anticipation of a Board hearing in this matter.

E. The Credibility of Respondent's Witnesses

Scott admits that he and Arledge conducted a six-week review of the attendance records. Additionally he acknowledges that during the review, he retroactively changed attendance documents during the process. Both Jim Scott and Kevin Scott testified that the review was conducted in October 2002. There is no dispute that the Union filed the charge in this case on October 4, 2002 and Scott admits that he received a copy of the charge in October.

Jim Scott testified that the 6-week audit of the attendance records was conducted because he discovered errors in Arledge's monitoring of the policy. He asserted that documents had to be changed because of Arledge's errors. Respondent also called Kevin Scott, Jim Scott's son, as a witness in this proceeding. Both Jim Scott and Kevin Scott testified that Kevin Scott signed off as authorizing supervisor for any discipline under the policy that involved only a verbal or written warning. Kevin Scott also admitted that Arledge appeared to be correctly submitting the attendance documents to him while it was his job to receive them from Arledge for the period from July to October 2002. He also acknowledged that he would not have known if Arledge failed to call an attendance violation to his attention because he did not independently check the employee time cards or the computer database. He admitted, that, if he had thought that Arledge was doing a bad job with the attendance records, he would have done his own investigation.

[17] Phelps testified that prior to his giving Huggins' an unexcused tardiness related to his son's head being caught in a couch, employee John Frye was excused for an absence involving a similar experience with his son. While Huggins was disciplined on July 2, 2002, Phelps identified a September 30, 2002 document from Frye's file as possibly the incident involving the related absence.

[18] I note that one of the contradictions mentioned in Respondent's brief was Respondent's offer of proof for a proposed witness for whom Respondent wanted to present in telephone testimony. His motion was denied.

[19] The transcript incorrectly included "she" rather than "he."

While Jim Scott asserted that Arledge's mistakes were sufficient to require his doing a 6-week review of the records, no disciplinary action was taken against Arledge. While Scott contends that Arledge made mistakes sufficient to require an audit, Respondent did not call Goldberg or any other witness to corroborate this reason for the audit. Kevin Scott testified that while he was aware that Arledge and Scott were making changes in the attendance records, he was not involved in the audit or aware of the specific changes made during the audit. Based upon his overall testimony, I do not find Jim Scott's testimony to be credible. Scott attempted to show that the reason for the alteration of the attendance documents was to correct mistakes that were the result of Arledge's negligence and a part of his efforts to fairly administer the attendance program. His testimony however, indicates that a motivating force in his alteration of the attendance records was his concern about going to court. He acknowledged: "I was the one that was going to have to stand here in front of a judge…." On cross-examination, Scott confirmed that Huggins was fired at the end of September 2002 and he then received an unfair labor practice charge in October. When he was asked if it had occurred to him that an investigation or even possibly a hearing would occur where attendance records might be in issue, Scott replied that it had occurred to him long before he received the charge.

It is certainly reasonable that even before Huggins' discharge and certainly after receipt of the charge, Scott had some expectancy that his records might become the subject of an investigation. As of the time of his October audit of the attendance records, he had already participated in the August 2002 unfair labor practice proceeding in which Huggins had testified. Having just experienced an unfair labor practice trial, it is reasonable that he would have been knowledgeable about preparing for an unfair labor practice proceeding with an awareness of what kinds of documents may be scrutinized in such proceedings.

On the basis of the entire record testimony, I find credible evidence that Respondent altered its attendance policy records to cover its disparate treatment of Huggins under its attendance policy. Having made that determination, I must amend my earlier findings in this case. As discussed above, my failure to find a violation in the Respondent's discipline to Huggins for attendance policy infractions was based in large part upon the lack of disparity as shown by Respondent's attendance records. This conclusion however, was premised upon the accuracy and veracity of the records. Crediting the testimony of Arledge, and as corroborated by Phelps, I cannot rely upon Respondent's records as accurate and genuine representations of Respondent's administration of its attendance policy. Accordingly, Respondent has failed to meet its burden under *Wright Line* in showing that it would have disciplined Huggins even in the absence of his protected activity. Based upon the total record evidence, I amend my decision to also find that Respondent unlawfully disciplined and ultimately discharged Huggins under the existing attendance policy in violation of Section 8(a)(1), (3), and (4).

V. ADDITIONALISSUES ARISING FROM THE PROCEEDING

A. The General Counsel's Motion to Amend the Complaint

To include an Additional 8(a)(1) Allegation

During the course of the hearing, counsel for the General Counsel moved to amend the complaint to allege Respondent's counsel as an agent of Respondent. Based upon testimony elicited on cross-examination, the General Counsel also moves to amend the complaint to allege that on or about October 2004, Respondent's counsel interrogated employees regarding their support of the Union and failed to provide them proper assurances when interviewing them in connection with the instant case. Counsel for the General Counsel confirms that the complaint amendment is sought solely upon the testimony of Respondent employee witness Gary Wayne Elmore. In *Johnny's Poultry*, 146 NLRB 770 (1964), the Board set forth its policy of permitting employer's to conduct employee interviews in order to ascertain facts necessary for the preparation of its defense against charges issued. The established policy requires that the employer must communicate the purpose of the interview and assure the employee that no reprisals will take place. Additionally, the employer must obtain the employee's participation on a voluntary basis and the questioning must occur in a context free from employer hostility to union organization. Finally, the questioning must not be coercive in nature and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, or elicit information concerning the individual's state of mind, or otherwise interfere with the statutory rights of the employee.

Elmore testified that prior to the trial,[20] he met with Respondent's counsel in the copy room at Respondent's facility. Respondent's counsel, herein Griffin, explained that he was meeting with Elmore because the company was going to court over the union matter. Elmore could not recall whether Griffin communicated anything further as to the purpose of the meeting. Elmore recalled that Griffin asked him some of the same questions that were asked of him on direct examination. Elmore did not remember if Griffin explained why he was asking those questions. Elmore recalled that while he discussed with Griffin his signing a union card; he also recalled that he told Griffin about his being solicited to sign a union card by supervisor Steven Phelps. When asked by counsel for the General Counsel whether Griffin said anything that sounded like he was promising or assuring that there would be no reprisals, Elmore responded in the negative. Specifically, he was asked: "Okay. Now, when he asked you that question or questions, did he give you any assurance or make any promise as to no retaliation, no reprisals, you know, based upon your answer?" Elmore responded: "No Sir."

On further examination however, Elmore acknowledged that he did not fully understand Counsel's question. He readily explained:

> Well, the only thing that I understand is that he said that this is strictly—everything that we're going to talk about is strictly

[20] There is no dispute that Elmore's meeting with Griffin occurred prior to and in preparation for the reopened hearing originally scheduled on August 10 and continued on October 12, 2004.

> voluntary. He told me that I could get up and walk out anytime I wanted to, so I had no problem. He says, if you feel uncomfortable with the conversation, you get up and walk out anytime you want to. Everything that we did that day was strictly voluntary.

When asked if he understood the meaning of the word "retaliation," Elmore explained: "I'm not on the big word thing." Elmore also acknowledged that he did not know the meaning of the word "reprisal." When it became apparent that the witness did not understand the questions being asked of him on cross-examination, he was asked if he understood what Griffin was saying to him and if Griffin's words made him feel like he could say what he wanted and he didn't have to worry about anything happening to his job. Again, Elmore testified that he had felt comfortable with the meeting with Griffin. He explained how Griffin put him at ease and gave him assurances that the meeting was completely voluntary and that he could walk out if he felt comfortable. Elmore explained that he felt comfortable sitting with Griffin and answering his questions. He explained:

> And if there was something I didn't understand, I would ask him to repeat it or whatever. I'm not a real smart man. I'm just a fairly simple man, so I think he probably knew that and he just - - he made everything simple for me.

Elmore's overall testimony fully supports the conclusion that Griffin's interview was completely free of coercion or hostility. I found nothing in Elmore's testimony to indicate that he was pressured or that he felt any obligation to testify on behalf of Respondent. Despite his initial responses, it was apparent that he did not understand Counsel for the General Counsel's questions and he had no understanding of the meaning of the words "retaliation" or "reprisal." I note that while Elmore acknowledged that he told Griffin that he had signed a union card, there is other record testimony that diminishes the coercive nature of such an inquiry. Arledge testified that Elmore came forward voluntarily in 2002 and told Scott that he had signed "the union paper." Arledge also recalled that Elmore volunteered to go back to other employees and solicit their acknowledgement that they had not understood what they were doing when they initially signed for the union. Thus, crediting Arledge, I find that there was no interrogation of Elmore as he had already voluntarily shared this information with Scott two years previously. Based upon the overall record testimony, I find no evidence that Griffin exceeded the bounds of legitimate pre-trial preparation or that Elmore participated in the meeting without adequate assurances. Accordingly, I deny General Counsel's motion to amend the complaint as alleged, finding no evidence to support that Respondent violated Section 8(a)(1) by interrogating an employee as alleged or by failing to comply with any pertinent aspect of *Johnny's Poultry* assurances.

B. General Counsel's Motion to Strike Jay Cowick's Testimony

When the hearing commenced in this re-opened matter on August 11, 2004, the parties and counsel were reminded that a sequestration order remained in effect from the 2003 trial period. Because of an unplanned interruption in the hearing, there was a two-month recess prior to reconvening on October 12. During both the August and October 2004 sessions, the Union's lead organizer; Curt Tharpe, appeared on behalf of the Union as the charging party. Additionally appearing in the hearing room on October 12 were two individuals who identified themselves as affiliated with the Union. Charlie Long, who introduced himself as a union organizer, explained that while he was attending the hearing that day, he would not testify. Jay Cowick identified himself as the business manager for the Union's local. Respondent's counsel confirmed that he had not subpoenaed either individual and understood that they were present as union representatives. He added however, that while he did not know whether he would need to call either individual, he wanted to reserve his right to do so if it became necessary. Respondent's counsel moved to expand the reservation of the sequestration order. Inasmuch as Respondent's counsel could not represent an expectation or intention to call either individual, no expansion was granted and the parties were again advised of the applicable rule.

Later in the day on October 12, Respondent called Jay Cowick as a witness. Cowick testified that as the business manager for the Union, he was union organizer Greg Boggs' boss. Cowick explained that while Boggs filed the original charge in this matter, he was no longer with the Union. Additionally, Cowick testified that he had not given Boggs authorization to present Steven Phelps and Cynthia Arledge as witnesses to the Board. When Counsel for Respondent inquired as to whether Cowick would have authorized their presentation if had known of Phelps' and Arledge's background, counsel for the General Counsel's objection was sustained. Counsel for Respondent submitted that such opinion testimony was relevant because of Respondent's objections to the reopened record. As Respondent's offer of proof, Cowick denied that he would have authorized the presentation of Arledge and Phelps if he had known their backgrounds. Cowick also testified that he had not authorized the initial charge and opined that Boggs had a grudge and vendetta against Jim Scott.

While counsel for the General Counsel did not object to Respondent's calling Cowick as a witness, Counsel for the General Counsel later moved that Cowick's testimony be stricken as a violation of the sequestration order. Rule 615 of the Federal Rules of Evidence provides that upon motion of a party or on upon its own motion, the court shall order witnesses excluded from the courtroom so they cannot hear the testimony of other witnesses. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is show by a party to be essential to the presentation of the party's cause or (4) a person authorized by statute to be present.

Very often the remedy for a violation of a sequestration order is to not credit the challenged testimony. See *Zartiac, Inc*., 277 NLRB 1478 (1986), *Unga Painting*, 237 NLRB 1306 (1978). As the Board pointed out in its *Unga* decision, "the purpose of exclusion is preventative; it is designed to minimize fabrication and combinations to perjure as well as mere inaccuracy." The Board also noted that it prevents the witness from hearing suggestions, whether conscious or unconscious, from which testimony may be shaped. In the instant matter, there is

no dispute that Cowick sat through a major portion of Arledge's cross-examination.[21] It is also without dispute that his testimony did cover any of the same topics or relate in any way to the testimony given by Arledge. At best, Cowick's testimony was offered as an evaluation of Arledge as a witness and an endorsement to disregard Arledge's testimony. Accordingly, inasmuch as there is no apparent factual correlation to Arledge's testimony, I find no basis to strike Cowick's testimony. With respect to the significance or to the weight to be given, however, I find no apparent relevance. Inasmuch as only the General Counsel has the authority to investigate additional unfair labor practice violations and thereafter expand the scope of a complaint,[22] Cowick's "opinion" on Arledge's and Phelps's background is irrelevant. Accordingly, I give no weight to his testimony.

C. General Counsel's Motion to Amend the Complaint

To Include a Request for Special Remedies

Counsel for the General Counsel also seeks to amend the complaint to expand the requested remedy. Specifically, the General Counsel seeks an Order requiring Respondent to reimburse the Board for all costs and expenses incurred in the investigation, preparation, and conduct of the hearing that opened on August 10, 2004 concerning the documents that are alleged to have been altered in connection with the hearing that opened on April 28, 2003 before the National Labor Relations Board and the courts.

The two issues that must be resolved with respect to the General Counsel's motion to amend the complaint to expand the remedies involve not only appropriateness but also timeliness. General Counsel did not move to amend the complaint to include this remedy until the fifth day of trial and 9 weeks after the trial opened on August 10, 2004. Additionally, I note that the General Counsel's October 14, 2004 motion to amend the complaint to include these special remedies came almost 5 months after the Board's Order and over 3 months after my order issued reopening the record and setting the matter for hearing. In my order reopening the record and dated July 8, 2004, I referenced conference calls with the parties on June 25 and June 29, 2004 in which Respondent's counsel raised the issue of prejudice by reopening the record without further pleadings. In my order, I responded to counsel's concerns and I specifically noted that General Counsel's motion to reopen the record had such specificity that it was in fact more explicit than a traditional complaint. It should be noted however, that Counsel for the General Counsel did not request or reference any intent to request special remedies in the extensive motion to reopen the record.

Section 10266.1 of the Board's Casehandling Manual provides that when the remedy sought is novel or unique, the complaint should contain a separate request for remedial relief in order to provide respondent adequate notice. Section 10268.1 also provides that where the Regional Office's determination of the need for a special remedy arises only after issuance of complaint, the respondent should receive prompt notification and the complaint should be amended. Section 102.17 of the Board's Rules and Regulations provide that a complaint may be amended at hearing upon motion to the administrative law judge.

The Supreme Court has long held that the Board should be given discretion in expanding the parameters of the initial charge in a matter. Specifically the Court noted in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959): "A charge filed with the Labor Board is not measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." The Court went on to point out that once the Board's jurisdiction is invoked, it must be left free to make full inquiry under its broad investigatory power in order to properly discharge the duty of protecting public rights that Congress has imposed upon it. Under Section 102.17 of the Board's Rules and Regulations, complaint amendments may be permitted "upon such terms as may be deemed just." In the instant matter, counsel for the General Counsel waited 5 months after the Board's Order and 3 months after my Order to move for the amendment to include a request for special remedies. The General Counsel does not assert that any specific event occurred during this trial period of 2 months that triggered this arguably untimely amendment. While this motion to amend may lack basic courtesy to Respondent, it does not appear to violate Respondent's due process rights. The issue of whether Respondent altered its attendance records in anticipation of Board litigation has been fully litigated. There is nothing to indicate that Respondent would have defended its case any differently had the General Counsel raised the issue of special remedies any earlier in this proceeding. Accordingly, I find that the General Counsel's motion is adequately timely within the spirit of the Board's Rules and Regulations.

With respect to reimbursement for litigation expenses, the Board has articulated certain standards in determining the appropriateness of the requested reimbursement. In *Tiidee Products*, 194 NLRB 1234, 1236-1237 (1972), enfd. as modified 502 F.2d 349 (D.C. Cir. 1974), cert. denied 421 U.S. 991 (1975), the Board found reimbursement to both the Board and the union for expenses incurred in the investigation, preparation, presentation, and conduct of cases necessary to discourage future frivolous litigation and to effectuate policies of the Act and to serve public interest. In its later decision in *Heck's Inc.,* 215 NLRB 765 (1974), the Board clarified that reimbursement of a charging party's litigation expenses will be ordered only where the defenses raised by the respondent are "frivolous" rather than "debatable." The Board explained that a respondent's defenses will be considered debatable if they turn on credibility, reasoning that parties should not be discouraged from seeking access to Board processes "where the credibility of witnesses leave an unfair labor practice issue in doubt." *Ibid* at 768. In a later decision in *Workroom for Designers*, 274 NLRB 840 (1985), the Board found flagrant violations of Sec-

[21] In its brief, Respondent asserts that Cowick "heard substantial testimony from numerous credible witnesses" that contradicted Phelps and Arledge with respect to the alleged drug usage. Respondent has patently exaggerated the record. Prior to testifying, Cowick was present during only one trial day and heard a portion of Arledge's cross-examination and the brief examination of only one other witness.

[22] *West Virginia Baking Corp*., 299 NLRB 306 (1990). Sec. 102.17 of the National Labor Relations Board Rules and Regulations.

tion 8(a)(1) and (3) of the Act and yet found that reimbursement of litigation costs was not warranted, relying in part on the fact that the merits of some allegations depended upon credibility. While the Board has found that the necessity for evaluating the credibility of witnesses would ordinarily render a defense debatable rather than frivolous, the Board has also departed from this standard in a case where the defense rested on "the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed." The Board further noted that the attorney, as the respondent's sole agent in bargaining, was in the unusual position of being able to determine from personal knowledge that the respondent's defense lacked credibility as well as merit. *Frontier Hotel & Casino,* 318 NLRB 857, 861 (1995), enfd. denied in relevant part 118 F.3d 795 (D.C. Cir. 1997). In finding the respondent's surface bargaining conduct to be flagrant, aggravated, persistent, and pervasive, the Board ordered the reimbursement of litigation costs of the charging parties as well as the General Counsel. In articulating its rationale, the Board opined that such a remedy was consistent with the Supreme Court's 1980 decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), wherein the Court acknowledged that "bad faith" warranting the reimbursement of attorneys fees "may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation."

Under the Board's existing precedent, the Board has primarily continued to provide a reimbursement remedy only in cases involving frivolous defenses and in cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. See *Cogburn Healthcare Center, Inc*., 335 NLRB 1397, 1402 (2001); *Waterbury Hotel Management*, 333 NLRB 482 fn. 4, (2001). In *Lake Holiday Manor*,[23] however, the Board awarded litigation costs and fees to the General Counsel, relying upon the "bad-faith" exception to the American rule found by the Supreme Court and discussed in *Frontier Hotel and Casino*, supra at 864. Specifically, the Board sustained the judge in awarding litigation costs and fees based the respondent's bad faith in the conduct of the litigation.

Citing two administrative law judge decisions[24] in its brief, Respondent argues that its conduct does not constitute bad faith justifying an award of fees and costs. Counsel for the General Counsel does not address the issue of debatable versus frivolous and simply relies upon the Board's holding in *Lake Holiday Manor* in asserting that the Board will grant litigation costs and attorneys' fees to the General Counsel when Respondent "exhibits bad faith in actions leading to the lawsuit or in the conduct of litigation."

The Board has continued to find a party's bad faith in litigation to warrant the award of litigation costs to General Counsel. *Teamsters Local. 122*, 334 NLRB 1190, 1194 (2001). In *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998), the administrative law judge awarded litigation costs to the union and the General Counsel. In affirming the judge's decision, the Board explained that in doing so they were relying upon both Section 10(c) of the act and the Board's inherent authority to control Board proceedings through an application of the "bad-faith" exception to the American rule discussed in *Frontier Hotel & Casino*, *supra* at 864. In citing its earlier decision in *Frontier Hotel & Casino*, the Board noted that the Supreme Court[25] has sanctioned the award of attorneys' fees where a party exhibits bad faith in actions leading to the lawsuit or in the conduct of the litigation. At first blush, it might appear that the instant case involves the issue of whether Respondent has raised debatable or frivolous defenses. Certainly, because credibility is paramount in this case, it may be argued that Respondent's defenses are debatable and thus the award of litigation costs would not be appropriate under the Board's ruling in *Heck's Inc*. I do not find however, that such an analysis addresses the circumstances of this case. This case is reopened and continues in litigation because the General Counsel has presented credible evidence that Respondent knowingly altered its records in anticipation of litigation and in response to charges filed under the National Labor Relations Act. Accordingly, based upon my findings herein, Respondent has engaged in bad faith in the litigation of this case and an award of litigation costs to the General Counsel is appropriate.

D. Respondent's Motion to Strike General Counsel's Exhibits

During the course of this reopened hearing, Counsel for the General Counsel offered into evidence a number of documents that were produced by Respondent in response to the General Counsel's subpoena. Arledge identified a number of these documents as records that had been altered as a result of the review conducted by Scott and Arledge. Arledge identified other documents as simply documents reflecting Respondent's disparate enforcement of its attendance policy. During the course of the hearing, Respondent moved to strike all of the General Counsel's exhibits that had not been specifically identified as allegedly improperly altered documents. Counsel for the General Counsel acknowledged that some of the documents submitted into evidence were submitted to provide an employee's full attendance record. At my request, counsel for the General Counsel prepared a summary listing the specific relevance of each document submitted by the General Counsel. The summary was provided to Respondent within 17 days after the close of hearing and 32 days before the briefs were submitted in this matter. Respondent asserts that the General Counsel's summary reflects that many of the General Counsel's submitted documents were apparently offered to show disparity in the enforcement of Respondent's attendance policy. Respondent contends that because the purpose of the reopened hearing was to determine whether the documents submitted during the 2003 hearing were improperly altered, documents concerning disparity are irrelevant.

Rule 402 of the Federal Rules of Evidence provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequences to the

[23] 325 NLRB 469, 469 (1998).

[24] I note that the Board has affirmed one of the administrative law judge decisions cited by Respondent. In *Planned Building Services*, 330 NLRB 791, 793 (2000), the Board affirmed the judge in finding no merit to the Union's request for reimbursement of litigation expenses. The Board specifically found that the Employer had not raised frivolous defenses and had in fact actually prevailed on several issues.

[25] *Roadway Express v. Piper*, 447 U.S. 752, 766 (1980).

determination of the action more probable or less probable than it would be without the evidence. Under Rule 403 of the Federal Rules of Evidence all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the rules of evidence, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Respondent is correct that records that relate to the issue of altered documents are more persuasive and specifically relevant to this proceeding. Inasmuch as this case involves Respondent's attendance records for a specific time period in 2002, all of Respondent's attendance documents for the relevant time period are arguably relevant. Inasmuch as Respondent does not dispute the authenticity of these documents, I find the attendance records submitted by General Counsel relevant within the scope of the Federal Rules of Evidence and admissible in this proceeding. Respondent's motion to strike General Counsel's exhibits is denied.

AMENDED CONCLUSIONS OF LAW

1. Sunshine Piping, Inc., Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act by its written warnings to Robert Huggins on August 26, 28, 30, 2002 as well as written warnings on September 13, and 16, 2002 and its suspension of Huggins on September 4, 2002.

4. Respondent violated Section 8(a)(1), (3), and (4) of the Act by terminating Robert Huggins on September 30, 2002.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate the Act in the other ways as alleged in the complaint.

REMEDY

Having found that the Respondent has violated Sections 8(a)(1), (3), and (4) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall recommend that Respondent rescind the discipline given to Robert Huggins on August 26, 28, and 30, 2002 and on September 4, 13, and 16, 2002. Having also found that Respondent discriminatorily discharged Robert Huggins, I shall recommend that Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also find that because Respondent altered its attendance records in anticipation of litigation and in responses to charges filed under the National Labor Relations Act, Respondent has engaged in bad faith in the litigation of this case. Accordingly, I find that such conduct warrants an order that Respondent reimburse the General Counsel for all litigation costs and attorneys' fees. Such costs and expenses to be determined at the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Sunshine Piping, Inc., Cedar Grove, Florida, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a)Discharging or otherwise discriminating against any employee for supporting United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local 366 or any other union.

(b)In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2.Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Huggins full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. Make Robert Huggins whole for any loss of earnings and any other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines and discharge, and within 3 days thereafter notify Huggins in writing that this has been done and the disciplines and the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Cedar Grove, Florida facility copies of the attached notice marked Appendix.[27] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order Of The National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f)Pay to the General Counsel the costs and expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding, since June 30, 2003, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

Dated, Washington, D.C. December 23, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge or otherwise discriminate against any of you for supporting United Association of Journeymen & Apprentices of the plumbing & Pipefitting Industry of the U.S. & Canada, AFL–CIO, Local Number 366 or any other union.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Huggins full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other right or privilege previously enjoyed.

WE WILL make Robert Huggins whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL , within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharge of Robert Huggins, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the disciple and discharge will not be used against him in any way.

WE WILL pay to the General Counsel the costs and expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding, since June 30, 2003, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding.

SUNSHINE PIPING, INC.